FILE COPY

Office Supreme Court, U.S.
FILED
MAR 2 1936
CHARLES ELMORE CROPLEY
CLERK

No. 640

In the

Supreme Court of the United States.

October Term, 1935.

J. EDWARD JONES, *Petitioner,*

vs.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

BRIEF FOR PETITIONER.

JAMES M. BECK,
Washington, D. C.,
BAINBRIDGE COLBY,
New York, N. Y.,
HARRY O. GLASSER,
Enid, Oklahoma,
J. N. SAYE,
Longview, Texas,
H. I. FISCHBACH,
New York, N. Y.,
Counsel for Petitioner.

TOPICAL INDEX.

	PAGE
TABLE OF CASES	I
TABLE OF APPENDICES	73
CITATIONS OF OPINION BELOW	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	1
ASSIGNMENT OF ERRORS	8
ARGUMENT	9
I. *The Constitutional Question*	9
(a) *The Commerce Clause*	13
(b) *The Use of the Mails*	39
II. *The Denial of Authority to Force Petitioner's Attendance by Subpoena*	57
CONCLUSION	72

TABLE OF CASES.

A.

	PAGE
Adair v. United States, 208 U. S. 161	42
Aikens v. Wisconsin, 195 U. S. 194, 206, 49 L. ed. 154, 160, 25 Sup. Ct. Rep. 3	44
Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173	23
Alexander v. King, 46 F. (2d) 235	14
American Bond & Mortg. Co. v. United States, (C. C. A. 7th) 52 F. (2d) 318, 285 U. S. 538, 76 L. ed. 931, 52 S. Ct. 311	20
Anderson v. United States, 171 U. S. 604, 615-615	30

B.

Bacon v. Illinois, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299	33
Badders v. United States, 240 U. S. 391, 36 S. Ct. 367, 60 L. ed. 706	43, 44, 50
Barrett v. Virginia Railway Co., 250 U. S. 473	59
Blumenstock Bros. v. Curtis Publishing Co., 252 U. S. 436, 444	38
Board of Trade v. Christie Grain, 198 U. S. 236, 246, 49 L. ed. 1031, 1037, 25 Sup. Ct. Rep. 637	16
Board of Trade v. Olsen, 262 U. S. 1	26
Bracey v. Darst, 218 Fed. 482	23
Brooks v. United States, 267 U. S. 432 (1925)	32
Burton v. United States, 202 U. S. 344, 371	42

C.

PAGE

Caminetti v. United States, 242 U. S. 470 (1917) 32, 33

Champion v. Ames, 188 U. S. 321, 357 (1903), 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561 ..... 31, 44

Champlin Refining Co. v. Corporation Commission, 286 U. S. 210 63

Child Labor Tax Case, 259 U. S. 34, 66 L. ed. 820 34

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475 33

Compton v. Allen, 216 Fed. 537 23

Continental Ins. Co. v. United States, 259 U. S. 156, 171, 66 L. ed. 871, 884, 42 S. Ct. 540 20

Coomer v. United States, 213 Fed. 1 40

Cybur Lumber Co. v. Erkhart, 247 Fed. 284 59

D.

Delaware L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902 33

Ducat v. Chicago, 10 Wall. 410 36

E.

Engel v. O'Malley, 219 U. S. 128, 139 30

Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877 ..... 39, 40, 41, 42, 43, 44, 47, 49, 50, 51

Ex parte Skinner & Eddy Corp., 265 U. S. 87 59

F.

Fairbank v. United States, 181 U. S. 283, 294, 300, 21 S. Ct. 648, 658, 45 L. ed. 862 ..... 53, 55

Federal Radio Comm. v. Nelson Bros., 289 U. S. 266, 77 L. ed. 1177 20

Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 32 A. L. R. 786 70

Ficklen v. Taxing Dist., 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810 15

G.

Graniteville Mfg. Co. v. Query, 44 F. (2d) 64 (same, 283 U. S. 376, 75 L. ed. 1126) 38

Greenleaf-Johnson Lbr. Co. v. Garrison, 237 U. S. 251, 260, 59 L. ed. 939, 944, 35 S. Ct. 565 20

Grimm v. United States, 156 U. S. 604, 15 S. Ct. 470, 39 L. ed. 550 50

H.

Hammer v. Dagenhart, 247 U. S. 251, 62 L. ed. 1105 ..... 32, 34, 39

Hall v. Geiger-Jones Co., 242 U. S. 539, 61 L. ed. 481 ..... 24, 25

Harriman v. Interstate Commerce Comm., 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115 70

Hatch v. Reardon, 204 U. S. 152, 162 ..... 28, 38

Hemphill v. Orloff, 277 U. S. 537 37

Hill v. Wallace, 259 U. S. 44 26

Hipolite Egg Co. v. United States, 220 U. S. 45 (1911) 31

PAGE

Hoke v. United States, 227 U. S. 308 (1913) 31
Hooper v. California, 155 U. S. 648 36
Hopkins v. United States, 171 U. S. 578, 588, 590, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40 ..... 15, 26, 27, 30
Horner v. United States, 143 U. S. 570, 12 S. Ct. 522, 36 L. ed. 266 50
Houston v. Moore, 5 Wheat. 1 55
Hunt v. New York Cotton Exch., 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529 17

I.

Illinois C. R. Co. v. De Fuentes, 236 U. S. 157, 163, 59 L. ed. 517, 519, P. U. R. 1915-A, 840, 35 Sup. Ct. Rep. 275 18
In re American States Public Service Co., 12 Fed. Supp. 667-711, inc... 47
In re Greene, 52 Fed. 113 33
In re Rapier, 143 U. S. 110, 12 S. Ct. 374, 36 L. ed. 93 ..... 42, 43, 44, 47, 49, 50, 51
International Text-book Co. v. Pigg, 217 U. S. 91, 54 L. ed. 685 ..... 21, 22
Interstate Commerce Comm. v. Brimson, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125 70
Jones v. Exchange and Securities Comm., 79 F. (2d) 617 43

K.

Kidd v. Pearson, 128 U. S. 1, 21, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6 34
Kolachny v. Galbreath, 26 Okl. 772, 110 Pac. 902 14

L.

Lewis Publishing Co. v. Morgan, 228 U. S. 288, 32 S. Ct. 867, 57 L. ed. 1190 ..... 40, 42, 49, 50, 51, 52
Liverpool Ins. Co. v. Massachusetts, 10 Wall. 56 36

M.

Milwaukee Publishing Co. v. Burleson, 255 U. S. 407, 41 S. Ct. 352, 65 L. ed. 704 ..... 40, 41, 49, 50, 51
Moore v. New York Cotton Exchange, 270 U. S. 593 ..... 26, 29
Mugler v. Kansas, 123 U. S. 623 55
McCulloch v. Maryland, 4 Wheat. 316, 423, 4 L. ed. 579, 605 35
McDermott v. Wisconsin, 228 U. S. 115 32

N.

Nathan v. Louisiana, 8 How. 73 37
New York v. Federal Radio Commission, (D. C.) 36 F. (2d) 115, 281 U. S. 729, 74 L. ed. 1146, 50 S. Ct. 246 20
New York Life Ins. Co. v. Cravens, 178 U. S. 389 36
New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 S. Ct. 167, 58 L. ed. 332 ..... 35, 36, 38
Noble v. Mitchell, 164 U. S. 367 36
Nutting v. Massachusetts, 183 U. S. 553 36

P.

PAGE
Panama Refining Co. v. Ryan, 293 U. S. 388 ..... 34, 60, 63, 64
Paul v. Virginia, 8 Wall. 168 ..... 36, 38
Pensacola Teleg. Co. v. Western U. Teleg. Co., 96 U. S. 1, 9, 24 L. ed. 708, 710 22
Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 613, 614, 56 L. ed. 911, 916, 917, 32 S. Ct. 589, 1 N. C. C. A. 892 20
Philadelphia Co. v. Stimson, 223 U. S. 605, 634, 638, 56 L. ed. 570, 582, 584, 32 S. Ct. 340 20
Philadelphia Fire Ass'n v. New York, 119 U. S. 110 36
Priddy v. Thompson, 204 Fed. 955 14
Public Clearing House v. Coyne, 194 U. S. 497, 24 S. Ct. 789, 48 L. ed. 1092 ..... 40, 43, 44, 45, 49, 50, 52
Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232 .. 18

R.

Radice v. New York, 264 U. S. 292, 294, 44 S. Ct. 325, 68 L. ed. 690 54
Reid v. Colorado, 187 U. S. 137 (1902) 31
Rich v. Doneghey, 71 Okl. 204, 177 Pac. 86, 3 A. L. R. 352 14

S.

Schecter v. United States, 295 U. S. 495, 55 Sup. Ct. 850, 79 L. ed. 1571 ..... 34, 60
Sioux Remedy Co. v. Cope, 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 Sup. Ct. Rep. 57 18
Smith v. Interstate Commerce Commission, 245 U. S. 33, 43, 62 L. ed. 135, 140, 38 Sup. Ct. Rep. 30 70
Sproles v. Binford, 286 U. S. 374, 390, 391, 76 L. ed. 1167, 1180, 52 S. Ct. 581 20
Stafford v. Wallace, 258 U. S. 495 26
Stephenson v. Binford, 287 U. S. 251, 272, 276, ante, 288, 301, 53 S. Ct. 181, 77 L. ed. 288, 87 A. L. R. 721 ..... 20, 54
Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276 ..... 26, 44

T.

Tagg Bros. and Marshall v. United States, 280 U. S. 520 26
Thomson-Houston Elec. Co. v. Holland, (D. C.) 160 Fed. 768 60
Trinity Methodist Church, South, v. Federal Radio Commission, 61 App. D. C. 311, 62 F. (2d) 850, 288 U. S. 599, ante, 975, 53 S. Ct. 317 20
Tyomies Publishing Co. v. United States, 211 Fed. 385 40

U.

U. S. Fidelity Co. v. Kentucky, 231 U. S. 394, 58 L. ed. 283 15
Union Bridge Co. v. United States, 204 U. S. 364, 397, 400, 401, 51 L. ed. 523, 539, 27 S. Ct. 367 ..... 20, 53
United States v. Chase, 135 U. S. 255, 10 S. Ct. 756, 34 L. ed. 117 50

PAGE

United States v. Coffee Exchange, 263 U. S. 520 26

United States v. Holte, 236 U. S. 140, 144, 59 L. ed. 504, 505, L. R. A. 1915-D, 281, 35 Sup. Ct. Rep. 271 44

United States v. Journal Co., 197 Fed. 415 40

United States v. Louisville & Nashville Railroad Co., 236 U. S. 318, 335, 59 L. ed. 598, 606, P. U. R. 1915-B, 247, 35 Sup. Ct. Rep. 363 70

United States v. Patton, 226 U. S. 525 26

United States v. Reading Co., 226 U. S. 324, 357, 57 L. ed. 243, 254, 33 Sup. Ct. Rep. 90 18

United States v. Stever, 222 U. S. 167, 173, 56 L. ed. 145, 147, 32 Sup. Ct. Rep. 51 44

United States v. Young, 232 U. S. 155, 161, 58 L. ed. 548, 551, 34 Sup. Ct. Rep. 303 44

W.

Ware & Leland v. Mobile County, 209 U. S. 405, 412-413 ..... 15, 28, 30

Warren v. United States, 183 Fed. 718 40

Western Union Telegraph Co. v. Foster, 247 U. S. 105, 62 L. ed. 1015 16

Western Union Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190 18

Wichita Railroad & Light Co. v. Public Utilities Comm., 260 U. S. 48, 67 L. ed. 124 64

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1935.

No. 640

J. EDWARD JONES, *Petitioner,*

vs.

SECURITIES AND EXCHANGE COMMISSION, *Respondent.*

BRIEF *for* PETITIONER.

(a) Opinion of Court Below.

(Nov. 4, 1935), 79 F. (2d) 617. Which opinion, being brief (R. 119-125, inc.), is printed as Appendix "A" hereto, pp. 74-80.

(b) Statement Upon Which Jurisdiction of This Court Is Invoked.

The jurisdiction of the Supreme Court is invoked under section 240 of the Judicial Code, as amended by the Act of February 13, 1925, and Supreme Court Rule No. 38.

(c) Statement of the Case.

The petitioner is a citizen of the State of New York, with his principal place of business at 342 Madison Avenue, City, County and State of New York.

The respondent is an administrative tribunal organized

and existing under and by virtue of section 4 of the Securities Exchange Act of 1934 (48 Stat. 885, 15 U. S. C. A. 78d).

On May 4, 1935, the petitioner filed with the respondent, a registration statement upon a proposed issue of participation trust certificates of proportionate ownerships in producing oil wells, for a total authorization of 1,000 certificates at the aggregate offering price of One Hundred Thousand Dollars ($100,000.00), pursuant to section 6(a) of the Securities Act of 1933 (15 U. S. C. A. 77f). (R. 33-89, inc.) Said registration statement, if action had not been taken with regard thereto by the respondent, would have become effective the twentieth day after the filing thereof. (Section 8(a), Securities Act of 1933; 15 U. S. C. A. 77h(a), a copy of which act for convenience in reference, being inserted herein between pages 80 and 81 as Appendix "B".)

However, on May 23, 1935, the day before said registration statement would have become effective, the respondent sent a telegram to the petitioner (R. 89-90), in which it was stated (in substance), that it appeared to the respondent that said registration statement included untrue statements of material facts and omitted to state material facts required to be stated therein and material facts necessary to make the statements therein not misleading. The petitioner was also informed that a hearing upon the matter would be held at the office of the respondent in Washington, D. C., at 10 A. M., Thursday, June 6, 1935, at which time and place the petitioner might appear and show cause why a stop order should not be issued suspending the effectiveness of such registration statement.

The hearing was continued until June 18, 1935. On June 13, 1935, George C. Matthews, one of the Commis-

sioners, issued a subpoena *duces tecum* (R. 90-91) commanding the petitioner to appear before William Green (a member of the legal staff), then acting as an officer of the Securities and Exchange Commission, at the office of the Commission in Washington, D. C., on the 18th day of June, 1935, at 10 o'clock A. M., of that date, to testify with reference to his registration statement and to bring with him certain books and records specified in the subpoena. The petitioner appeared at the hearing on June 18th, 1935, by counsel, who formally withdrew petitioner's registration statement and tendered a written statement by petitioner, copy of which is annexed hereto as Appendix "C," pp. 81-83. The examiner denied the right to withdraw the registration statement, and proceeded with the hearing, the full transcript of which is printed in the record in case No. 639, and the material portions of which are reproduced in Appendix "D" hereto, pp. 83-87. The hearing not having been concluded on June 18th, was adjourned until June 27, 1935.

On June 18th, 1935, William Green, acting as an officer of the respondent, issued a subpoena (R. 96) to the petitioner, requiring him to appear before said officer at the office of the respondent in Washington, D. C., on the 27th day of June, 1935, to testify in the matter of the hearing on the registration statement of the petitioner.

The petitioner refused to obey this subpoena in person.

His counsel, however, entered a special appearance at said hearing and presented to the presiding officer four (4) documents (duly verified in the manner provided by law); namely,

(a) dismissal (R. 96-97),

(b) motion to dismiss (R. 97-98),

(c) motion to quash subpoena (R. 98-99),

and,

(d) objection to jurisdiction. (R. 100-101).

Copies of said documents were duly tendered to and received by counsel for the Commission, and were submitted to the examiner who, over the objection of counsel for the Commission, sustained the right of the petitioner as a registrant to present such documents.

Thereupon each document was formally presented by petitioner's counsel and overruled and denied by the examiner (proceedings of June 27th, 1935, R., case No. 639, pages 157-164, the material portions of which are reprinted as Appendix "E" hereto, pp. 88-96).

Appropriate exceptions were noted in the record, and petitioner's counsel again withdrew from the proceedings.

The Securities Act of 1933, before the amendment of 1934, was administered by the Federal Trade Commission (Title 1, Securities Act of 1933, sub-section 5 of section 2, 15 U. S. C. A. 77b(5)). By the amendment of June 6, 1934, the duties of the Federal Trade Commission were transferred to the Securities and Exchange Commission, and all orders, rules and regulations which had been issued by the Federal Trade Commission under the Securities Act of 1933 were continued in full force and effect until superseded, revoked or repealed by the Securities and Exchange Commission. (June 6, 1934, c. 404, section 210, 48 Stat. 908; 15 U. S. C. A. 78ii.) The respondent, in issuing the aforesaid orders, relied as its authority upon a *rule,* termed Release No. 47 (Appendix "H" hereto, pp. 105-110), which had been promulgated and issued by the Federal Trade Com-

mission. That part of Release No. 47 which is pertinent to the issues herein involved, reads:

> "Any registration statement or amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. * * * Such consent shall be given by the Commission with due regard to the public interest and the protection of investors."

Being aggrieved by the aforesaid orders of the respondent, the petitioner, pursuant to section 9(a) of the Securities Act of 1933 (13 U. S. C. A. 77i(a)), filed a petition in the United States Circuit Court of Appeals for the Second Circuit, praying for a review thereof (R. 29), upon the denial of which this court refused to grant *certiorari*.

Stay order not having been issued by the Circuit Court of Appeals when the petition for review was filed in that court, the respondent proceeded under sub-section (b) of section 9 of the Securities Act (15 U. S. C. A. 77i(b)).

After the petitioner had filed his petition for review in the Circuit Court of Appeals, the respondent pursuant to section 22(b) of the Securities Act of 1935 (15 U. S. C. A. 77v(b)), on July 3, 1935, filed an application in the District Court of the United States for the Southern District of New York for an order requiring the petitioner to appear before William Green, an officer of the Securities and Exchange Commission, there to give evidence in the hearing and examination entitled, in the matter of the registration statement of J. Edward Jones, File 2-1408-1. (R. 2-15, inc.)

In response to a rule to show cause why the respondent's application should not be granted by the District Court, the petitioner appeared in that court and challenged:

(a) The jurisdiction of the court to require obedience to the subpoena of the respondent, because of the proceedings pending in the Circuit Court of Appeals to review the act of the respondent in denying the petitioner the right to withdraw his registration statement (R. 27, 28);

(b) the authority of the respondent to issue a subpoena to compel petitioner's attendance (R. 22 and 26);

(c) the validity of the orders of the respondent denying the right to withdraw his registration statement and in overruling his various motions to withdraw and dismiss the proceedings before the respondent, and in refusing to quash the subpoena issued by the respondent and served upon petitioner (R. 25-26);

(d) the validity of the Federal Trade Commission's Release No. 47, was further challenged in the argument below as *(1)* being unauthorized by the Securities Act of 1933, and, *(2)* because it had not been published as required by section 19(a) of the act (15 U. S. C. A. 77s), and *(3)* because the release failed to include findings of fact to show that such rule was (or is) necessary to carry out the provisions of the Act; and,

(e) the validity of the respondent's orders denying the petitioner's motions to dismiss and withdraw his registration statement was likewise there challenged for the failure to support such orders by the necessary findings of fact, which would bring them within an exception to that part of Release No. 47 which requires that the respondent's consent to an application to withdraw a registration statement shall be given with due regard to the public interest and the protection of investors;

(f) the validity of the Securities Act of 1933, as amended, because:

(1) it is an unlawful attempt upon the part of Congress to delegate its powers to respondent;

(2) it is an attempt upon the part of the Congress to regulate the purchase and sale of securities and the acts and conduct of those engaged in that business, in violation of the 10th Amendment to the Federal Constitution (R. 23);

and,

(3) the act, as construed and applied by the respondent, violates the 4th and 5th Amendments to the Federal Constitution. (R. 23)

The District Court overruled all of the aforesaid contentions of the petitioner, held Release No. 47 to be authorized by the Securities Act, that it had been properly promulgated and issued by the respondent, and was a valid rule; that the respondent was authorized, under the act and under said rule, to deny petitioner's motions to dismiss his registration statement, and held that the Securities Act was a proper exercise of congressional authority under article 1, section 8, of the Federal Constitution, which confers upon the Congress power *(1)* to regulate commerce with foreign nations and among the several states, and *(2)* to establish post offices and post roads, and ordered the petitioner to obey the respondent's subpoena.

The petitioner duly prosecuted an appeal from the order of the District Court to the Circuit Court of Appeals for the Second Circuit. That court consolidated the argument upon the petition for review and the case on appeal.

The Circuit Court of Appeals dismissed the petition for review on the ground that the orders of the respond-

ent denying the petitioner's motions to dismiss and withdraw his registration statement and to quash the subpoena served upon him were not orders which the petitioner was entitled to have reviewed by that court under section 9(a) of the Securities Act (15 U. S. C. A. 77i(a)); *certiorari* to review this judgment was denied by this court. In the case instituted in the District Court by the Commission, the Circuit Court of Appeals upheld the validity of Release No. 47 and the orders of the respondent denying the various motions of the petitioner to withdraw and dismiss his registration statement, the order refusing to quash the subpoena served upon him, and upheld the Securities Act as a valid exercise of power by the Congress under article 1, section 8, of the Federal Constitution, which confers upon the Congress the power to establish post offices and post roads. The Circuit Court of Appeals pretermitted a decision upon the question as to whether or not the Securities Exchange Act could be sustained under the commerce clause of the Federal Constitution as being unnecessary to a determination of the case, and affirmed the order of the lower court directing the petitioner to appear before the Commission and testify in accordance with its subpoena.

A petition for rehearing thereon was duly filed in the Circuit Court of Appeals and denied. (R., case No. 640, 126)

Certiorari was granted February 3rd, 1936.
—*Advance Opinions*, Vol. 80, L. ed. 423. (R. 129)

(d) Specification of Assignment of Errors.

For errors relied upon by petitioner, see Appendix "F," pages 96-102.

ARGUMENT.

I.

The Constitutional Question.

At the outset, we submit that notwithstanding the recitation of the enacting clause of the Securities Act of 1933, that its purpose is,

> "* * * to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails and *to prevent frauds* in the sale thereof and for other purposes,"

in operation it does nothing of the kind.

If the *truth* be told in the registration statement, and printed in the balance-sheet in the prospectus, it matters not how *fraudulent* or *worthless* the security may be, it may go into interstate commerce and the mails.

Upon the contrary, the most valuable security on the market may not be permitted in interstate commerce or the mails, if the issuer has

(a) failed or refused to register his security,

or,

(b) in registering, has

(*1*) omitted to state a material fact,

or,

(*2*) misstated a material fact.

The effect of such regulation is not to prevent fraud, but to induce it, and the enforcement of the act will but destroy the common law right of recovery for actionable fraud upon *any registered security,* no matter how worthless it may prove to be, or how erroneous the judgment of the

Commission may have been in determining that the *truth* had been told in the registration statement.

The situation in fact is made doubly misleading to the public, in that while the Commission by its rules and action pretends to get at the truth of the representations contained in the registration statement, it protests that it does not and *will not pass on values* or determine whether securities are good or bad.

How can fraud be prevented unless it does so?

To tell the truth about a fraudulent security, and thus immunize it in interstate commerce and the mails, would be about as helpful to the public as raising the quarantine upon the leper, merely because he states that he is a leper.

We quote from the Yale Law Journal, December, 1933, Vol. XLIII, page 171, No. 2, as follows:

> "The Securities Act though probably one of the most spectacular types of legislation, is of secondary importance in a comprehensive program of social control over finance. Some, however, have believed, apparently in all sincerity that the great drop in security values in the last five years was the result of failure to tell the 'truth about securities.' And others have thought that with the Securities Act it would be possible to prevent a recurrence of the scandals which have brought many financiers into disrepute in recent years. As a matter of fact there are but few of the transactions investigated by the Senate Committee on Banking and Currency which the Securities Act would have controlled. There is nothing in the Act which would control the speculative craze of the American public, *or which would eliminate wholly unsound capital structures.* There is nothing in the Act which would prevent a tyrannical management from playing wide and loose with scattered minorities, or which would prevent a

new pyramiding of holding companies violative of the public interest and all canons of sound finance. *All the Act pretends to do is to require the 'truth about securities' at the time of issue, and to impose a penalty for failure to tell the truth. Once it is told, the matter is left to the investor.*

"But even the whole truth cannot be told in such simple and direct terms as to make investors discriminating. A slow educational process must precede that. Those who need investment guidance will receive small comfort from the balance sheets, statistics, contracts, and details which the prospectus reveals.

"At the present time one could not expect more far reaching effects. The economy under which we live is not static. Industry is not stabilized and under our present methods never can be. Competition and the progress of invention make it inevitable that many enterprises will fail. The toll of technology over a period of years is enormous. And the downward turn of the business cycle may eliminate more than just the marginal enterprise. Other factors of management, not related to cupidity and fraud, contribute to the same end. As a result, a substantial percentage of industrial investment will in any event be lost. To speak then of underwriting the values which are based on such unstable foundations is sheer nonsense. And to expect that the judgment of investors as respects these imponderable factors will improve perceptibly in this generation is baseless optimism.

"This is reason enough why the state should not pronounce investments sound or unsound. To the business community it seems likewise sufficient reason for tempering and moderating the liabilities of those responsible for the issue. For, it is said that when security values shrink as they have in the last few years it is but natural to find blame laid at the door of those who got the money, who were identified with the flotation, or who were connected with the management. In

that connection it is also urged that risks should not be placed so high as to deter substantial and honest men from engaging in legitimate business."

In urging upon the Congress the enactment into law of the legislation complained of, the President on March 29th, 1933, in a special message (H. R. Rep. No. 85, 73rd Congress, 1st Session, p. 1), said:

"* * * let the seller also beware * * *."

The law itself, however, does not reach the goal, and changes the rule. The abuses of sales technique continue to prevail to the detriment of the investing public, because the law does not insure the investor a *quid pro quo* for what he parts with.

The exaction of money from the gullible is facilitated by the mass of intricacies in the prospectus authorized by the registration of securities.

No longer does the rule of fair value obtain.

The test ordained by this legislation is—did the vendor state the facts in the registration statement? If the answer is in the affirmative, the vendor is beyond the process of the law, regardless of how little value may have been in the security or how great the fraud actually practiced in its sale.

Manifestly, the act regulates and permits the regulation of the conduct of the citizen, before any security is offered for transportation in any of the instrumentalities of commerce or through the United States mails, which is an

"* * * exercise of police power not delegated to the United States by the Constitution nor prohibited by it to the states,"

but specifically by the Tenth Amendment,

> "* * * reserved to the states respectively, or to the people."

If authority be in the Congress to enact the complained of legislation, it must be found in

(a) the Commerce clause of the Constitution (subdivision 3 of section 8, of Art. I thereof);

or,

(b) in the authority to establish post offices and post roads (subdivision 7 of Sec. 8 of Art. I thereof);

and the constitutionality of the act will be considered under these respective subdivisions:

(a) *The Commerce Clause.*

Commissioner Landis (Chairman of the Commission) in testimony before the House Committee on interstate commerce, stated that,

> "I speak primarily of the interstate commerce power, because *I do not believe* that legislation *of this type* (the regulation of the Stock Exchange) can be based effectively upon any other power than the congressional power over interstate commerce."

Manifestly the purchase and sale in New York of units of ownership in "oil royalties" in Oklahoma must be made *interstate commerce,* if the act is to be held valid under the commerce clause.

The right of the owner of lands permeated by oil and gas, to drill wells and reduce these products to possession, is an *incorporeal hereditament* and the proper subject of sale, and may be granted or reserved, and a lease conferring the right for a specified time to *mine and operate*

upon the lessor's premises for oil and gas, grants to the lessee a present *vested interest in the land.*

—*Rich* v. *Doneghey,* 71 Okl. 204, 177 Pac. 86, 3 A. L. R. 352;

Alexander v. *King,* 46 F. (2d) 235 (10th Cir.);

Priddy v. *Thompson,* 204 Fed. 955 (8th Cir.);

Kolachny v. *Galbreath,* 26 Okl. 772, 110 Pac. 902.

The conclusion that a mineral right is

"an incorporeal hereditament,"

requires that an interest therein (in Oklahoma) within the provisions of the laws of that state, must be recorded as a part of the realty, and documents evidencing subsequent conveyances with regard thereto must likewise be subsequently recorded in advance of change of record ownership.

Such requirement precludes a definition of "security" in such transactions, and if the act be held valid in respect to other matters, it clearly is invalid as a pretended regulation of oil royalty sales upon lands in Oklahoma which are dealings in real property in that state.

We quote from Oklahoma Statutes 1931, section 9661:

> "No deed, mortgage or other conveyance relating to real estate *or any interest therein,* other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the grantors; * * *"

also from section 9672:

> "Except as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease or other instrument *relating to real estate,* other than a lease for a period *not exceed-*

ing one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided.";

and from section 9673:

"Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers, or creditors."

Section 5 of the act defines "interstate communication" to be "interstate commerce." Such of course is not the law.

In *U. S. Fidelity Co.* v. *Ky.*, 231 U. S. 394, 58 L. ed. 383, in which the constitutionality of a Kentucky license tax upon a commercial agency was upheld, the court said:

"The circumstance that in a substantial number of cases—even if in the greater number—there is correspondence, by letter or otherwise from state to state, which may perhaps have an effect upon the conduct of other parties about entering or not entering into transactions of interstate commerce, *is not controlling.*

"The present case has no close parallel in former decisions, but in some of its aspects it bears a resemblance to the case of a tax imposed upon a resident citizen engaged in a general business that happens to include a considerable share of interstate business. *Ficklen* v. *Taxing Dist.*, 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810. Or the business of the live stock exchange that was under consideration in *Hopkins* v. *United States*, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40. Or the business of a cotton broker dealing in futures or options. *Ware* v. *Mobile County*, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031.

"To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. We do not think the present is such a case."

In the brief in the United States Circuit Court of Appeals, counsel for the Commission at page 49 thereof state, that:

"Not only are the securities themselves the subjects of interstate commerce, *but a long line of cases* has established that mere interstate communication is subject to regulation by Congress under the commerce clause."

Citing:

Western Union Telegraph Co. v. *Foster,* 247 U. S. 105, 62 L. ed. 1015.

In that case an order of the Massachusetts Public Service Commission recited that the Gold & Stock Telegraph Company by the Western Union lessee and the United Telegram Company, had without just cause, refused to supply to Calvin H. Foster, the continuous quotations of the New York Stock Exchange, by means of ticker service then supplied to others, declared the refusal an unlawful discrimination and required the two companies to remove the discrimination forthwith.

We quote from the opinion:

"The material facts may be abridged as follows: The New York Stock Exchange, having a monopoly of the information collected by it on the floor of the Exchange concerning the prices quoted in transactions there, made contracts with the plaintiffs in error of the same general character as those before the court in *Board of Trade* v. *Christie Grain & Stock Co.,* 198

U. S. 236, 246, 49 L. ed. 1031, 1037, 25 Sup. Ct. Rep. 637, and *Hunt* v. *New York Cotton Exch.*, 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529. By these contracts for specified lump sums the Exchange agreed to furnish to the telegraph companies simultaneously full and continuous quotations of prices made in transactions upon the Exchange. The telegraph companies 'may' in their turn furnish quotations to their 'patrons' at intervals of more than fifteen minutes, subject to discontinuance upon objection of the Exchange, and may furnish continuous service by ticker to subscribers, provided the latter sign applications in duplicate, one of which is to go to the Exchange, the application not to be effectual until the subscriber is approved by the Exchange, agreeing that the telegraph company may discontinue the service 'whenever directed so to do by said New York Stock Exchange.' The application recognizes that the quotations are furnished under contract with the Exchange, and agrees not to furnish the quotations to branch offices or correspondents unless first approved by the Exchange and also signing agreements, one of which is to be delivered to the Exchange. The contract states that the intent of the Exchange in reserving the right to disapprove, etc., is only to prevent improper and unlawful use of the facts.

"The Gold & Stock Telegraph Company's business is carried on by the Western Union Telegraph Company in the name of the former. The quotations are furnished to the latter in New York, telegraphed by it to the office of the Gold & Stock Company in Boston, translated from the Morse code into English and thence transmitted by an operator to the tickers in the offices of the brokers who have subscribed and have been approved. The United Telegram Company, a New Jersey corporation, receives quotations for Boston alone, where is its principal office outside of New Jersey. They are furnished by the Exchange in New York, telegraphed to the Boston office over a wire of the Postal Telegraph Cable Company, and thence transmitted as

in the other case. On these facts the plaintiffs in error say that the order is an unwarranted interference with commerce among the states and takes property without due process of law, setting up the Constitution of the United States.

"• • • *It is admitted* that the transmission from New York to Massachusetts by the telegraph company *was interstate commerce.*"

If so, it continued such, until it reached

"• • • the point where the parties originally intended that the movement should finally end.' *Illinois C. R. Co.* v. *De Fuentes,* 236 U. S. 157, 163, 59 L. ed. 517, 519, P. U. R. 1915A, 840, 35 Sup. Ct. Rep. 275.

"If the transmission of the quotations is interstate commerce, the order in question cannot be sustained. It is not like the requirement of some incidental convenience that can be afforded without seriously impeding the interstate work. It is an attempt to affect in its very vitals the character of a business generically withdrawn from state control—to change the criteria by which customers are to be determined and so to change the business. It is suggested that the state gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error, under their present charters, could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end (*United States* v. *Reading Co.* 226 U. S. 324, 357, 57 L. ed. 243, 254, 33 Sup. Ct. Rep. 90), and a constitutional power cannot be used by way of condition to attain an unconstitutional result (*Western U. Teleg. Co.* v. *Kansas,* 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; *Pullman Co.* v. *Kansas,* 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 Sup. Ct. Rep. 57)."

From the foregoing quotations from the opinion, it will be readily observed that the case is not in point. It was admitted that the *quotations were being carried in interstate commerce* and an attempted interference by the State of Massachusetts with the facilities of the Western Union Telegraph Company in its delivery of the New York stock quotations to its customers, in Boston, was an unwarranted and illegal act upon the part of the state.

It is needless to observe that the quotations before delivery to the Western Union were exclusively within the control of the New York Stock Exchange, and were necessary to and form a vital part of interstate business with relation to the commodities sold upon the exchange.

There could be no disagreement in the *Western Union* case, as to the interstate character of the delivery of the quotations in Boston to the customers of the Western Union Company by that company, and a contrary contention was not made by the State of Massachusetts. The state did contend that after the quotations had reached Boston and were broken up for personal delivery as the contents of the package shipped in interstate commerce may be broken for local delivery, the interstate nature of the shipment was thereupon destroyed, and that in the delivery of the quotations within the City of Boston the control thereof was intrastate and within Massachusetts.

Mr. Justice HOLMES' decision to the contrary, is sound, but it is not here in point.

It is then said, by counsel for the Commission, that,

"* * * the regulation of radio broadcasting and receiv-

ing stations has been judicially upheld on the same theory."

Citing:

Federal Radio Comm. v. *Nelson Bros.*, 289 U. S. 266, 77 L. ed. 1177.

An examination of that decision will disclose that the material reference to interstate commerce in the opinion is contained in the following quotation:

"• • • This court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises. *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400, 401, 51 L. ed. 523, 539, 27 S. Ct. 367; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 634, 638, 56 L. ed. 570, 582, 584, 32 S. Ct. 340; *Philadelphia B. & W. R. Co.* v. *Schubert*, 224 U. S. 603, 613, 614, 56 L. ed. 911, 916, 917, 32 S. Ct. 589, 1 N. C. C. A. 892; *Greenleaf-Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251, 260, 59 L. ed. 939, 944, 35 S. Ct. 565; *Continental Ins. Co.* v. *United States*, 259 U. S. 156, 171, 66 L. ed. 871, 884, 42 S. Ct. 540; *Sproles* v. *Binford*, 286 U. S. 374, 390, 391, 76 L. ed. 1167, 1180, 52 S. Ct. 581; *Stephenson* v. *Binford*, 287 U. S. 251, 276, *ante*, 288, 301, 53 S. Ct. 181, 87 A. L. R. 721; *New York* v. *Federal Radio Commission*, (D. C.) 36 F. (2d) 115, 281 U. S. 729, 74 L. ed. 1146, 50 S. Ct. 246; *American Bond & Mortg. Co.* v. *United States*, (C. C. A. 7th) 52 F. (2d) 318, 285 U. S. 538, 76 L. ed. 931, 52 S. Ct. 311; *Trinity Methodist Church, South*, v. *Federal Radio Commission*, 61 App. D. C. 311, 62 F. (2d) 850, 288 U. S. 599, *ante*, 975, 53 S. Ct. 317."

That decision does not support the Commission's position.

In *International Text-book Co.* v. *Pigg*, 217 U. S. 91, 54 L. ed. 685, also cited by the Commission, there was involved the validity of a Kansas statute requiring foreign corporations before instituting any suit in the courts of the State of Kansas, to comply with certain provisions of the Kansas statute with regard to the filing (with the Secretary of that state) a complete detailed statement of the financial condition of such corporation on the 30th day of June next preceding. The validity of the statute turned upon the question of whether it imposed a burden upon interstate commerce.

We quote from the decision:

"It is true that the business in which the International Text-book Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the states within the meaning of the Constitution of the United States. It involved, as already suggested, regular and practically continuous intercourse between the Text-book Company, located in Pennsylvania, and its scholars and agents in Kansas and other states. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this *mode of imparting and acquiring an education may not be such as is commonly adopted in this country*, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that; this mode—looking at the contracts between the Text-book Company and its scholars—*involved the transportation from the state where the school is located to the state in which the scholar resides, of books, apparatus, and papers, useful or necessary in the particular course of study* the scholar is pursuing, and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. *Intercourse of that kind, between parties in different states*—particularly

> when it is in execution of a valid contract between them—*is as much intercourse in the constitutional sense, as intercourse by means of the telegraph*—'a new species of commerce,' to use the words of this court in *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.*, 96 U. S. 1, 9, 24 L. ed. 708, 710.
>
> "* * * In our further consideration of this case, we shall therefore assume that the business of the Text-book Company, by means of correspondence through the mails and otherwise between Kansas and Pennsylvania, was interstate in its nature."

The background of every case involving a constitutional question, must necessarily have considerable bearing upon its ultimate determination, and such was the case in *International Text-book Company* v. *Pigg, supra.* Intercourse of the kind there detailed, could not have been held to be otherwise than interstate, but the court did not intend to intimate that the Federal Government might go to Scranton, Pennsylvania, to examine into the truth of the claims of the International Text-book Company, as *to the truth of the teachings in its publications,* as a condition precedent to the *books being shipped into Kansas.*

The petitioner is prepared to admit, that if the act in question kept fraudulent securities out of commerce and the mails, and was a regulation of the thing in commerce, rather than a policing of the conduct of citizens before a tender in commerce, or the mails, has been made, a quite different question would be presented.

Will it be thought that the salesman of the lottery ticket might ship the same in commerce or through the mails, by making a full and truthful disclosure as to just what the ticket is, or may the thief secure immunity by filing a *caveat* in the county of the state in which he proposes to

steal an automobile that upon a certain day he will do so? Certainly not; and no case has heretofore held, or has it been supposed that the conduct of the shipper prior to shipment could, or would, have anything to do with an otherwise contraband shipment, or that *wrongful* conduct when supervised by the Federal Government will be in the general welfare.

Such regulation is not of *commerce;* it is of *conduct* which may not in fact ever result in commerce of any kind.

How can Congress, under the commerce clause, regulate commerce that has not yet come into existence?

In further support of the Commission's position, counsel cited:

Compton v. *Allen,* 216 Fed. 537;

Bracey v. *Darst,* 218 Fed. 482;

and,

Alabama & N. O. Transp. Co. v. *Doyle,* 210 Fed. 173;

and promptly admit (brief, Circuit Court of Appeals, page 47) that,

> "* * * to the extent that these cases hold state blue-sky laws invalid under the commerce clause, they are *probably inconsistent* with the *later* decisions of the Supreme Court in *Hall* v. *Geiger-Jones Co.,*" 242 U. S. 539, 61 L. ed. 481.

Such admission carries the citations indicated out of the discussion, for the evident reason that a determination of a burden upon interstate commerce was erroneously made to reach a further erroneous conclusion which is admitted by counsel.

After having made such admission, it is then argued that the Supreme Court in *Hall* v. *Geiger-Jones Co., supra.,*

"* * * recognized that securities are articles of commerce."

Let us see if this is so.

Justice McKenna there said:

> "The provisions of the law, it will be observed, apply to dispositions of securities *within* the state, and while information of those issued in other states and foreign countries is required to be filed (Secs. 6373-9), they are only affected by the requirement of a license of one who deals in them *within* the state. Upon their transportation into the state there is no impediment—no regulation of them or interference with them after they get there. There is the restriction only that he who disposes of them there shall be licensed to do so and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, *if they may be regarded as such. It is a police regulation strictly,* not affecting them, until there is an attempt to make disposition of them within the state. To give them more immunity than this, is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally." (Citing cases.)

The entire quoted comment by Justice McKenna is predicated upon the conclusion that the requirements of the statute, at most, but imposed an *indirect burden* upon interstate commerce, *if* securities which might be transported into the state

"* * * may be regarded as * * *"

objects of interstate commerce.

Such statement does not determine that *securities* shipped into the state are objects of commerce, and it was not necessary to so determine, inasmuch as the decision squarely turned upon the approval of an exercise of the state's police power, which but emphasizes the petitioner's contention that what the Federal Government is now seeking to do through the Securities Commission, is exactly what Justice McKenna, by clear inference, held the state might *exclusively* do.

The approval of the Securities Act by this court will involve the conclusion that the opinion in *Hall* v. *Geiger-Jones, supra,* was ill-advised and that the act of the state there reviewed, must now be thought to have been an invasion of the federal sovereignty.

It must be certain that the authority to so legislate cannot be delegated to the Federal Government under the commerce clause, and at the same time be reserved to the states under the Tenth Amendment. Such is the effect of the Commission's position and contention.

Justice McKenna in effect said, that if *securities* are in interstate commerce, they are not sufficiently so, to make a state statute unconstitutional which regulated the conduct of one dealing therein in such state.

Manifestly, *Hall* v. *Geiger-Jones, supra,* is in petitioner's favor.

We think counsel for the Commission misconceive the basis of congressional control over interstate commerce, as distinguished from its control over the instrumentalities of commerce such as railroads, telegraph, telephone, etc., which arises from the power which the federal government possesses *to insure the free movement of commodities,* or

subjects of such commerce, between the states. To this extent direct and substantial interference by the states is prohibited.

These principles have found application in the Packers and Stock Yards Act and the Grain Futures Act, the constitutionality of which have been upheld, and in which federal control was exercised over certain practices on live stock and grain exchanges. The transactions made the subject of federal regulation by these acts were not themselves regarded as interstate commerce, although the live stock or grain to which they related necessarily moved in interstate commerce. In fact, this court has repeatedly held that transactions upon commodity exchanges do not constitute interstate commerce. *Hopkins* v. *United States,* 171 U. S. 578; *Hill* v. *Wallace,* 259 U. S. 44; *Moore* v. *New York Cotton Exchange,* 270 U. S. 593. It is the effect of such transactions upon the *stream of commodities* moving in interstate commerce that makes them subject to federal regulation. *Swift & Co.* v. *United States,* 196 U. S. 375; *United States* v. *Patten,* 226 U. S. 525; *Stafford* v. *Wallace,* 258 U. S. 495; *Board of Trade* v. *Olsen,* 262 U. S. 1; *United States* v. *Coffee Exchange,* 263 U. S. 611; *Tagg Bros. and Marshall* v. *United States,* 280 U. S. 520. This is made manifest by the statement of Chief Justice TAFT in *Board of Trade* v. *Olsen, supra,* when he said:

> "The sales on the Chicago Board of Trade are just as indispensable to the continuity of the flow of wheat from the West to the mills and distributing points of the East and Europe as are the Chicago sales of cattle to the flow of stock toward the feeding places and slaughter and packing houses of the East."

In the foregoing cases Congress undertook the regulation of transactions in commodities raised or produced with the *expectation* that they would move through instruments of commerce, the railroads, and become a part of the flow of such commerce between the states. Consumption of such commodities within the state of their origins, except to a very limited extent would be impossible. Their production, marketing and sale to the ultimate consumer necessarily constitutes an interstate business. It is constant in its relation to the law of supply and demand and any interruption of that relationship through transactions of the character prohibited by the acts referred to, would necessarily constitute an interruption of and burden upon interstate commerce. The transportation and terminal facilities of the railroads are likewise dependent upon continuity in the flow of such commodities in interstate commerce.

None of these conditions obtains in respect to the business of buying and selling securities. There are no circumstances *requiring* securities to move from state to state in order to be dealt with. They may find a ready market on exchanges, or in over-the-counter trading, in the state of their issue. Nor are the facilities of the railroads in any sense dependent upon the movement of securities between the states.

In *Hopkins* v. *United States*, 171 U. S. 578, transactions on the Kansas City Live Stock Exchange, an unincorporated association, having to do with the purchase and sale of cattle, hogs and other live stock, were held not interstate, the court saying:

> *"The selling of an article at its destination, which has been sent from another state, while it may be re-*

garded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce." (Italics supplied.)

In *Hatch* v. *Reardon*, 204 U. S. 152, an act of the State of New York imposing a stamp tax of two cents on the $100 of face value of shares of stock, when sold in New York by a resident of Connecticut to a resident of the latter state doing business in New York, was held not a burden on interstate commerce, the court saying:

> "The fact that the property sold is outside of the state and the seller and buyer foreigners are not enough to make *a sale* commerce with foreign nations or among the several states, and *that is all that there is here.*"

In *Ware & Leland* v. *Mobile County*, 209 U. S. 405, a statute of Alabama imposing a license tax on stock and cotton exchanges and the persons trading thereon for the purpose of buying and selling futures, was held not a regulation of interstate commerce although such purchases or sales were executed through the medium of an agent in Mobile, Alabama, on the New York or New Orleans Cotton Exchanges. The court said:

> "The appellants are brokers who take orders and transmit them to other states for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual de-

livery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery, *as result in actual delivery of the grain or cotton,* the stipulated facts show that when the orders transmitted are received in the foreign state the property is bought in that state and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign state, although the orders were received from another state. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, *that was not because of any contractual obligation so to do.* In neither class of contracts, for sale or purchase, *was there necessarily* any movement of commodities in interstate traffic, because of the contracts made by the brokers.

"These contracts are not, therefore, the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company. The delivery, when one was made, *was not because of any contract obligating an interstate shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce.*" (Italics supplied.)

In *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, it was said:

"The New York Exchange is engaged in a local business. Transactions between its members are purely

local in their inception and in their execution. They consist of agreements made on the spot for the purchase and sale of cotton for future delivery, with a provision that such cotton must be represented by a warehouse receipt issued by a licensed warehouse in the Port of New York and be delivered from such warehouse. *Such agreements do not provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another.* If interstate shipments are actually made, *it is not because of any contractual obligation to that effect;* but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce. *Ware & Leland* v. *Mobile County,* 209 U. S. 405, 412-413. The most that can be said is that the agreements are likely to give rise to interstate shipments. *This is not enough. Engel* v. *O'Malley,* 219 U. S. 128, 139. See, also, *Hopkins* v. *United States,* 171 U. S. 578, 588, 590; *Anderson* v. *United States,* 171 U. S. 604, 615-616." (Italics supplied.)

The purchase of an interest in an oil royalty which may never result in (and does not necessarily contemplate) a shipment of oil in interstate commerce, is equally within the rule just quoted.

If, as a result of such purchase, shipments of oil may actually be subsequently made in interstate commerce, such shipments would not be so made because of any contractual obligation to that effect.

There is nothing in this act which attempts to purify the thing in commerce. The security which may be placed in the channels of interstate commerce is not sanctified by the grace of registration. Its value is not certified—indeed, even the truth of the prospectus which under the act must

accompany the security or *precede* it is not assumed or assured by the fact of registration.

The restraint placed upon the conduct of citizens by section 5, couched as it is as a pretended regulation of commerce, eloquently illustrates the resort to a pretended exercise of a delegated power "for the accomplishment of a wholly unrelated end."

As we have heretofore said, the Securities Act does not purify the channels of interstate commerce, nor does it cleanse the stream. Above all, it does not safeguard the purchaser or the recipient of the article subjected to such classification by the act.

Earlier statutes which prohibited the transportation of persons or objects in interstate commerce, were manifestly designed to protect and safeguard the stream of commerce, and prevent contamination not only of the steam itself, but the banks through which it flowed, as well as the depths it left in its course.

Thus, in *Reid* v. *Colorado,* 187 U. S. 137 (1902), diseased live stock was excluded to prevent the contamination of cattle domestic to the states through which the commerce flowed.

In *Champion* v. *Ames,* 188 U. S. 321 (1903), lottery tickets were excluded to prevent a nation becoming one of gamblers.

In *Hipolite Egg Company* v. *United States,* 220 U. S. 45 (1911), adulterated food products were required to be labeled for what they were, in order that the *facilities* of interstate commerce might not be *misused;* and in *Hoke* v. *United States,* 227 U. S. 308 (1913), and *Caminetti* v.

United States, 242 U. S. 470 (1917), the transportation of women for immoral purposes, was outlawed.

In *Brooks* v. *United States,* 267 U. S. 432 (1925), the transportation of stolen automobiles is prevented as a "gross misuse of interstate commerce."

The decisions in the foregoing cases, as well as in *McDermott* v. *Wisconsin,* 228 U. S. 115, were all clearly distinguished in *Hammer* v. *Dangenhart,* 247 U. S. 251, 62 L. ed. 1105.

The opinions of this court in *McDermott* v. *Wisconsin, supra; Caminetti* v. *U. S., supra,* and *Hammer* v. *Dagenhart,* were written by Mr. Justice Day in point of time in the order of their recitation, and in *Hammer* v. *Dagenhart, supra,* in which the child labor statute was considered, Mr. Justice Day reviewed the reasons supporting each of these decisions, as well as such other decisions as are cited by the Commission, and reaches a conclusion which not only is in conflict with the position of the Commission, but one which fully supports the petitioner.

After reviewing the entire question, in *Hammer* v. *Dagenhart, supra,* Mr. Justice Day, at length, stated that:

> "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.
>
> "This element is wanting in the present case. The thing intended to be accomplished by this statute is the *denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages.* The act in its effect does not

regulate transportation among the states, *but aims to standardize the ages at which children may be employed in mining and manufacturing* within the states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.

"Commerce 'consists of intercourse and traffic • • • and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. *Delaware, L. & W. R. Co.* v. *Yurkonis*, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902.

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation. 'When the commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, *but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state.*' Mr. Justice JACKSON in *Re Greene*, 52 Fed. 113. This principle has been recognized often in this court. *Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Bacon* v. *Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299, and cases cited. *If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the state—a result certainly not contemplated by the framers of the Constitution when they vested in Con-*

gress the authority to regulate commerce among the states. Kidd v. *Pearson,* 128 U. S. 1, 21, 32 L. ed. 346, 350, 2 Inter. Com. Rep. 232, 9 Sup. Ct. Rep. 6."

Mr. Justice DAY's statement is so justly applicable here, that it seems to the petitioner to be unanswerable; and the recent statement of Mr. Chief Justice HUGHES, in *Schechter* v. *United States,* 295 U. S. 495, 55 Sup. Ct. 850, 79 L. ed. 1571, to the same effect, which we quote, is equally applicable:

"* * * If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control."

See, also:

Panama Refining Co. v. *Ryan,* 293 U. S. 388.

In the *Child Labor Tax Case,* 259 U. S. 34, 66 L. ed. 820, Mr. Chief Justice TAFT reaffirmed the opinion in the *Dagenhart* case, by saying:

"* * * The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax; and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a state, in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce,

but rather that of state concerns, and was invalid. So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution. This case requires, as did the *Dagenhart* case, the application of the principle announced by Chief Justice MARSHALL in *McCulloch* v. *Maryland*, 4 Wheat. 316, 423, 4 L. ed. 579, 605, in a much-quoted passage:

> 'Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would became the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land'."

The petitioner further contends that a *security* is not in any event such article or commodity that it may be the subject of commerce between the states.

In *New York Life Insurance Company* v. *Deer Lodge County*, 231 U. S. 495, the Supreme Court upheld the validity of a Montana statute imposing a tax upon insurance premiums collected in that state, and in disposing of the contention of the insurance company that its business was interstate because conducted in large measure through the use of the mails, it was said, at page 509:

> "To accomplish the purpose there is necessarily a great and frequent use of the mails and this is elaborately dwelt on by the insurance company in its pleading and argument, it being contended that this and the transmission of premiums and the amounts of the policies constitute a 'current of c o m m e r c e among the states.' This use of the mails is necessary, it may be, to

the centralization of the control and supervision of the details of the business; *it is not essential to its character.*" (Italics supplied.)

A closely related series of cases are those setting forth the doctrine that insurance, in all its forms, is not interstate commerce. *Paul* v. *Virginia,* 8 Wall. 168; *Ducat* v. *Chicago,* 10 Wall. 410; *Liverpool Ins. Co.* v. *Massachusetts,* 10 Wall. 56; *Philadelphia Fire Ass'n* v. *New York,* 119 U. S. 110; *Hooper* v. *California,* 155 U. S. 648; *Noble* v. *Mitchell,* 164 U. S. 367; *New York Life Ins. Co.* v. *Cravens,* 178 U. S. 389; *Nutting* v. *Massachusetts,* 183 U. S. 553; *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495.

In the latter case, it was urged that the enormous importance of insurance to interstate commerce, particularly in its relationship to the interstate shipment of goods, justified the reversal of its earlier decisions holding that insurance was not interstate commerce. The court, however, affirmed the doctrine announced in *Hooper* v. *California, supra,* where it was said:

"* * * the general rule (that insurance is not commerce) and its exceptions are based * * * (upon) the difference between interstate commerce or an instrumentality thereof on one side and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which such commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely do-

mestic in their nature. The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea'."

These decisions establish that the business of insurance is not immune from state regulation as being interstate commerce. The corollary, that the business of insurance cannot be regulated by the Federal Government because it is not interstate commerce, would seem to follow. Indeed, a committee on the judiciary of the United States Senate unanimously reported that insurance was not subject to federal regulation as interstate commerce. (Senate Report No. 4406, 59th Congress, first session.)

In *Nathan* v. *Louisiana,* 8 How. 73, it was held that a broker engaged in the use of the mails in buying and selling foreign bills of exchange "is not engaged in commerce, but in supplying an instrument of commerce."

In *Hemphill* v. *Orloff,* 277 U. S. 537, a "Massachusetts trust" doing a business of buying and selling negotiable notes in various states was held not engaged in interstate commerce in respect to the ownership of notes of a resident of Michigan where it undertook to enforce them without having first complied with local law requiring domestication of corporations. The court said:

"Upon the facts disclosed the court below held the trust was carrying on a business of dealing in negotiable notes within the State of Michigan; and we find no reason for rejecting that conclusion. *Such business is not interstate commerce. Nathan* v. *Louisiana,*

8 How. 73; *Paul* v. *Virginia*, 8 Wall. 168; *Hatch* v. *Reardon*, 204 U. S. 152, 162; *Blumenstock Bros.* v. *Curtis Publishing Co.*, 252 U. S. 436, 444."

In *Graniteville Manufacturing Co.* v. *Query*, 44 F. (2d) 64, the validity of a South Carolina stamp tax was upheld as not imposing a burden on interstate commerce in respect of a series of notes executed by the plaintiff over a period of years—between 1923 and 1930—and sent by it to banks outside of the state for discount. The District Court of the Eastern District of South Carolina said:

> "The plaintiff contends also that the laying of the tax in question is a burden upon interstate commerce. But under the decisions of the Supreme Court it is plain that the notes in question did not constitute interstate commerce. They are mere personal contracts. The making of such a contract is a mere incident of commercial intercourse, and sending the notes by mail or otherwise from one state to another does not constitute interstate commerce. See *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, 34 S. Ct. 167, 58 L. ed. 332, where the subject is fully discussed and the decisions reviewed."

The foregoing decision was affirmed in 283 U. S. 376.

Consideration of the act as a whole, we think, can lead to no other conclusion than that it is in violation of the Tenth Amendment, and is an attempt upon the part of Congress to regulate the sale and purchase of securities. The court will quickly perceive by comparing the information required in a registration statement by section 7, the effective date of the registration statement as provided by section 8, the information required in a prospectus by section 10 and by Schedule A of the Act, with the civil liabilities imposed by sections 11 and 12 of the Act, with the

provision of subsection (d) of section 6, which makes the information in or filed with *a registration statement available to the public*, that the object of the act is to safeguard the investing public—not to regulate the postal service or interstate commerce. Section 7 does not provide that a registration statement shall contain such information as will show that the security described is a proper subject of commerce.

Section 11 does not attempt to impose civil liabilities for misuse of the mails or the instrumentalities of interstate commerce, but rather for the sale of securities based upon a registration statement which contains an untrue statement of a material fact or for the omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

The act itself presents an identical picture with that which was before the court in *Hammer* v. *Dagenhart, supra*, and for the reasons expressed by the court in that opinion should be held to be an invasion of constitutional guaranties.

(b) *The Use of the Mails.*

The power to "establish post offices and post roads", has been held to comprehend the right to regulate the postal system of the United States and generally to determine what may or may not be carried in the mails.

—*Ex parte Jackson*, 96 U. S. 727.

Cases in which this power of the Congress has been upheld have very generally related to matter which might be excluded because properly considered contrary to pub-

lic policy or inimical to the public welfare, such as matter concerning the lotteries, *Ex parte Jackson, supra;* matter involving schemes to defraud, *Public Clearing House* v. *Coyne,* 194 U. S. 497; matter of a scurrilous or defamatory nature, *Warren* v. *United States,* 183 Fed. 718; matter tending to incite treason or forcible resistance to the laws of the United States, *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407; and matter of an obscene or indecent nature, *Coomer* v. *United States,* 213 Fed. 1; *Tyomies Publishing Co.* v. *United States,* 211 Fed. 385; *United States* v. *Journal Co.,* 197 Fed. 415.

The provisions of the act attempting to exclude from the mails correspondence, or other matter relating to the business of buying and selling securities, would, therefore, involve an extension of this power of Congress in a manner not heretofore attempted, and, it is respectfully submitted, without warrant under the Constitution.

The provisions of the act in this respect would seem to be founded upon some such assumption of power as that contended for by the government in *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288, 57 L. ed. 1190, which contention as paraphrased in the opinion of the court, was said to constitute

> "* * * an exertion by Congress of its power to establish post offices and post roads, a power which conveys an absolute right of legislative selection as to what shall be carried in the mails and which therefore is not in anywise subject to judicial control even although in a given case it may be manifest that a particular exclusion is but arbitrary because resting on no discernible distinction nor coming within any discoverable principle of justice or public policy."

In refusing to adopt the view that the power of Congress to control the use of the mails involved any such unlimited application, the court, speaking through Chief Justice WHITE said at page 316:

> "* * * we do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition embodied in the proposition of the Government which we have previously stated."

The power of Congress to control the use of the mails may not be exercised in such manner as to deny or destroy rights, either guaranteed by other provisions of the Constitution, or expressly reserved to the people by the Tenth Amendment.

In *Ex parte Jackson*, 96 U. S. 727, the court said at page 732:

> "The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people of far greater importance than the transportation of the mail."

Nothing in the opinion of the court in *Milwaukee Publishing Company* v. *Burleson*, 255 U. S. 407, is at variance with this doctrine for, as stated in the dissenting opinion of Mr. Justice BRANDEIS, at page 430:

> "The power to police the mails is an incident of the postal power. Congress may, of course, exclude from the mails matter which is dangerous or which

carries on its face immoral expressions, threats or libels. It may go further and through its power of exclusion exercise, within limits, general police power over the material which it carries, even though its regulations are quite unrelated to the business of transporting mails. *In re Rapier,* 143 U. S. 110; *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288. As stated in *Ex parte Jackson,* 96 U. S. 727, 732: 'The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.' *In other words, the postal power, like all of its other powers, is subject to the limitations of the Bill of Rights. Burton* v. *United States,* 202 U. S. 344, 371. Compare *Adair* v. *United States,* 208 U. S. 161."

It is not to be believed, therefore, that the Commission under color of the power conferred by the act, may prescribe rules and regulations destructive of the constitutional rights of those engaged in the buying and selling of unlisted securities in over-the-counter markets. To so hold would concede to the Commission a power which Congress does not possess and which might be exercised in such manner as to hinder and delay, if not in fact to render impossible the transaction of important business of a purely private nature, the conduct of which is as much in the public interest as is the correction of the economic conditions which the act was designed to effect.

In its operation and effect, the Securities Act regulates individual sales and purchases of securities, but it does not regulate the mails. It is therefore void, because it transcends the power of Congress in violation of the Tenth Amendment to the Federal Constitution.

The regeneration of the human race and the purification of the hearts of men, are matters that have not been intrusted to the national Congress.

The wording of the act leaves no mist between the eye and its application. It applies to the person—not the thing.

Judge MANTON, speaking for the Circuit Court of Appeals, 79 F. (2d) 619, said:

> "The appellant contends that the Securities Act of 1933, as amended, is unconstitutional because the securities are not subjects of commerce. But the power of Congress as it relates to control *over the use of the mails,* is fully sustained by the cases which have considered the mail fraud statutes."

Citing:

Badders v. *United States,* 240 U. S. 391, 36 S. Ct. 367, 60 L. ed. 706;

Public Clearing House v. *Coyne,* 194 U. S. 497, 24 S. Ct. 789, 48 L. ed. 1092;

In re Rapier, 143 U. S. 110, 12 S. Ct. 374, 36 L. ed. 93;

Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877.

The statement of Judge MANTON pretermits the constitutional question upon the commerce clause, as we have heretofore said, and sustains the act upon the authority of *mail fraud* cases which we think are wholly unrelated to the subject.

A brief notice of the cases cited by Judge MANTON will be made.

Badders v. *United States, supra,* involved the indictment of Badders for having *deposited* letters in the United States mail,

> "* * * for the purpose of executing a *scheme to defraud,* devised by him. * * *."

The contention in the Supreme Court was,

(a) that the provisions of the Criminal Code are,

"* * * beyond the power of Congress, as *applied to what* may be a mere incident to a fraudulent scheme that itself is outside the jurisdiction of Congress";

(b) and that cumulative punishment for the separate deposit of separate letters constituted cruel and unusual punishment.

Justice HOLMES, speaking for the court, said:

"These contentions need no extended answer. The overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. *Ex parte Jackson,* 96 U. S. 727, 24 L. ed. 877. Whatever the limits to the power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not. *Re Rapier,* 143 U. S. 110, 134, 36 L. ed. 93, 102, 12 Sup. Ct. Rep. 374; *Public Clearing House* v. *Coyne,* 194 U. S. 497, 507, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; *United States* v. *Stever,* 222 U. S. 167, 173, 56 L. ed. 145, 147, 32 Sup. Ct. Rep. 51. See *Lottery Case (Champion* v. *Ames),* 188 U. S. 321, 357, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *United States* v. *Holte,* 236 U. S. 140, 144, 59 L. ed. 504, 505, L. R. A. 1915D, 281, 35 Sup. Ct. Rep. 271. Intent may make an otherwise innocent act criminal, if it is a step in a plot. *Aikens* v. *Wisconsin,* 195 U. S. 194, 206, 49 L. ed. 154, 160, 25 Sup. Ct. Rep. 3; *Swift & Co.* v. *United States,* 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276. The acts alleged have been found to have been done for the purpose of executing the scheme, and there would be no ground for contending, if it were argued, that they were too remotely connected with the scheme for the law to deal with them. The whole matter is disposed of by *United States* v. *Young,* 232 U. S. 155, 161, 58 L. ed. 548, 551, 34 Sup. Ct. Rep. 303."

Clearly, such conclusion so eminently correct in that case, does not authorize the conclusion that Congress might establish an agency to first determine whether the letters which Badders wished to deposit would offend the postal laws.

That will entail endless difficulties. Badders and every other citizen deposits his letter in the mail *at his peril,* if it violates the Criminal Code of the United States, or of the state in which it is deposited, and that rule is generally respected by the user of the mails.

That is as it should be, and the Government is now armed (as this case so well points out) with all of the authority it needs to regulate the mails.

Of course, regulation of the conduct of the user of the mails before such use, greatly broadens the field and cannot be sustained as a regulation of the use of the mails.

In *Public Clearing House* v. *Coyne, supra,* Mr. Justice Brown said:

> "The constitutional principles underlying the administration of the Post Office Department were discussed in the opinion of the court in *Ex parte Jackson,* 96 U. S. 727, 24 L. ed. 877, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded; and that in the enforcement of such regulations a distinction was made between letters and sealed packages subject to letter postage, and such other packages as were open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, and that the constitutional guaranty a g a i n s t unreasonable searches and seizures extended to letters, but did not extend to printed matter. In establishing such system

Congress may restrict its use to letters, and deny it to periodicals; it may include periodicals and exclude books; it may admit books to the mails, and refuse to admit merchandise; or it may include all of these and fail to embrace within its regulations telegrams or large parcels of merchandise, although in most civilized countries of Europe these are also made a part of the postal service. It may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employees or injurious to other mail matter carried in the same packages. The postal regulations of this country, issued in pursuance of Act of Congress, contain a long list of prohibited articles dangerous in their nature, or to other articles with which they may come in contact; such, for instance, as liquids, poisons, explosives, and inflammable articles, fatty substances, or live or dead animals, and substances which exhale a bad odor. It has never been supposed that the exclusion of these articles denied to their owners any of their constitutional rights. While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefits of its postal service, and deny it to another person in the same class, and standing in the same relation to the government, it does not follow that under its power to classify mailable matter, applying different rates of postage to different articles, and prohibiting some altogether, it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as, in its judgment, are making use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public morality. For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has

never been attacked. The same provision was, by the same act, extended to letters and circulars connected with lotteries and gift enterprises, the constitutionality of which was upheld by this court in *Re Rapier*, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374."

We think the foregoing well summarizes the power of Congress with regard to the mails, and inasmuch as *Ex parte Jackson, supra, Clearing House* v. *Coyne, supra,* and *Re Rapier, supra,* each involve some phase of the lottery question, what was said by Mr. Justice BROWN will apply with equal importance with regard to each of the cases cited by Judge MANTON.

If Congress may regulate the conduct of the *dealer in securities before he uses the mails,* then Congress may regulate the conduct of *every other use of the mails for any purpose whatsoever;* and inasmuch as the use of the mails is indispensable to the activities of citizens in any field of endeavor, the extension of congressional control to the extent contended for by the government, would subject the citizen's right to pursue such activities to the absolute domination of the Federal Government.

An extended and learned opinion reviewing the postal powers of Congress, was lately rendered by Judge COLEMAN in the United States District Court for the District of Maryland, in *Re American States Public Service Co.,* 12 Fed. Supp. 667-711, inc.

We quote from that opinion:

"Turning now to the question of the right of Congress to exclude these companies from the use of the mails as it purports to do by the equally broad provisions of the Public Utility Holding Company Act, the argument is made that whatever may be said with re-

spect to possible limitations upon the power of Congress to restrict the use of the instrumentalities of interstate commerce, the force of this reasoning disappears when we turn to a consideration of the mails, *because the power of Congress over the mails is by the Constitution proprietary and absolute;* that there can be no mail facilities except those which Congress itself creates and over which it has entire dominion; whereas interstate commerce exists as an inherent thing; it was not created by any power granted in the Constitution, and Congress is given power merely to regulate such commerce, albeit, in some instances, the power to regulate must, in the public interest, imply the power to prohibit or exclude.

"A correct answer to this argument implies some consideration of the history of the postal power of Congress. This power flows from article 1, sec. 8, cl. 7, of the Constitution, whereby Congress is given power 'to establish post offices and post roads.' The Federalist contains but a single reference to this power (The Federalist, No. 42). Likewise, there was little discussion or debate in the Constitutional Convention with respect to this clause, perhaps due to a fear, on the part of some at least, of appearing to give the central government too much power, and thus endangering the chances of adoption of the Constitution as a whole. See Farrand Records of the Federal Convention, vol. 1, p. 243; vol. 2, pp. 135, 177, 303, 324, 590, 615; vol. 3, pp. 604, 607.

"In the early years of the government, the view was maintained by some that by this grant Congress was given merely the power to designate the routes over which the mails should be carried and the post offices where they should be received and distributed, and to exercise the necessary protection in relation thereto, and that it did not include the power to construct and operate agencies for the actual carrying and distribution of the mails. See President Monroe's Veto of the Cumberland Road Bill, May 4, 1822; 'The Postal

Power of Congress' by Lindsay Rogers; Studies in Historical and Political Science, vol. 34 (1916), Johns Hopkins University Studies. However, the rapid expansion of the mail service from the very creation of our government, and its ever-increasing importance in the everyday lives of our people, are common knowledge. Suffice it to say for the present inquiry that whereas the form of the original grant was merely to establish post offices and post roads, nevertheless, to create and regulate the entire postal system of the country has been declared by the Supreme Court to be the evident and necessary intent of this grant. That is, a power in Congress far beyond the limitations of a precise interpretation of the form of the grant has for many years been conceded. In other words, the Supreme Court has declared that the grant necessarily carried with it the right to exercise all power incident to making the grant effective. So Congress may exclude articles dangerous to mail employees or injurious to other mail matter, and may prevent the use of the mails for fraudulent purposes or in derogation of the public morals. See *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877; *In re Rapier*, 143 U. S. 110, 12 S. Ct. 374, 36 L. ed. 93; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 24 S. Ct. 789, 48 L. ed. 1092. Similarly, privileges such as second-class mail rates may be granted to one class of mail matter and denied to another, and the special privileges so conferred may be conditioned or revoked for cause. *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, 33 S. Ct. 867, 57 L. ed. 1190; *United States, ex rel. Milwaukee Publishing Co.*, v. *Burleson*, 255 U. S. 407, 41 S. Ct. 352, 65 L. ed. 704. In all of these instances, however, the exclusion related directly to the matter itself sought to be transmitted by the mails, that is, to the *offending thing* * * *. *We are thus brought face to face with the question whether Congress may, in the exercise of its postal power, thus arbitrarily exclude any and all matter from the mails even though harmless in character, as a means primarily of con-*

trolling the persons who would thus transmit the harmless things and not the things themselves. This precise question appears never to have been presented to the Supreme Court for decision.

"How far has Congress gone in the matter of exclusion which has been upheld as a valid exercise of the postal power? The following exclusions have been upheld: Lottery tickets and related matter *(Ex parte Jackson,* 96 U. S. 727, 24 L. ed. 877; *In re Rapier,* 143 U. S. 110, 12 S. Ct. 374, 36 L. ed. 93; *Horner* v. *United States,* 143 U. S. 570, 12 S. Ct. 522, 36 L. ed. 266). Obscene matter *(United States* v. *Chase,* 135 U. S. 255, 10 S. Ct. 756, 34 L. ed. 117; *Grimm* v. *United States,* 156 U. S. 604, 15 S. Ct. 470, 39 L. ed. 550). Seditious matter *(United States, ex rel. Milwaukee Pub. Co.,* v. *Burleson,* 255 U. S. 407, 41 S. Ct. 352, 65 L. ed. 704). Publications which fail to furnish information relative to ownership and circulation *(Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288, 33 S. Ct. 867, 57 L. ed. 1190). Fraudulent matter *(Public Clearing House* v. *Coyne,* 194 U. S. 497, 24 S. Ct. 789, 48 L. ed. 1092; *Badders* v. *United States,* 240 U. S. 391, 36 S. Ct. 367, 60 L. ed. 706).

"Thus it will be seen that exclusion has been upheld for the purpose of preventing use of the mails for an unlawful purpose, although Congress lacked the power to deal directly with the wrong involved. For example, it was said as early as 1877, in *Ex parte Jackson, supra* (96 U. S. 727, at page 732, 24 L. ed. 877), where a law was upheld forbidding lottery circulars in the mails:

> 'The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.'

"Similarly, it was said in the case of *In re Rapier, supra* (143 U. S. 110, at page 134, 12 S. Ct. 374, 36 L. ed. 93), which confirmed *Ex parte Jackson,* and upheld exclusion from the mails of newspapers containing lottery advertisements: 'The states, before the Union was formed, could establish postoffices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish postoffices and post-roads was surrendered to the Congress, it was as a complete power; and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.'

"But are there no limitations upon the right of Congress to determine what shall be excluded? May such right be exercised arbitrarily, in derogation of rights guaranteed by other parts of the Constitution? May Congress in fact indirectly, through its postal power, interfere at will with constitutional guaranties, when such interference would be prohibited if attempted directly? In spite of certain statements in some of the earlier decisions which, if isolated and considered apart from the precise facts and the *ratio decidendi* of the given case, may lend some little support to an affirmative answer to this question, we nevertheless believe that the law is otherwise. Obviously, the First Amendment, which guarantees freedom of speech and of the press, is not violated by exclusion from the mails of lottery tickets *(Ex parte Jackson; In re Rapier, supra);* nor of seditious matter *(United States, ex rel. Milwaukee Pub. Co.* v. *Burleson, supra);* nor of publications which fail to furnish information relative to ownership and circulation *(Lewis Publishing Co.* v.

Morgan, supra). Similarly, the guaranty of due process of law under the Fifth Amendment is not denied by excluding from the mails publications which do not comply with postal regulations requiring information as to ownership and circulation *(Lewis Publishing Co.* v. *Morgan, supra);* or seditious matter *(United States, ex rel. Milwaukee Pub. Co.,* v. *Burleson, supra);* or when letters sent for illegal purposes are seized and returned to the sender, under postal regulations; or where the Postmaster General, in the exercise of authority vested in him by Congress, determines, on the basis of substantial evidence, upon exclusion of certain matter after due notice, and after a hearing had been afforded *(Public Clearing House* v. *Coyne; United States, ex rel. Milwaukee Pub. Co.,* v. *Burleson, supra).*

"Has exclusion from the mails ever been upheld by the Supreme Court where the matter excluded was not, in and of itself, either *(1)* offensive or harmful to the public generally, or *(2)* not in compliance with postal regulations reasonably calculated to aid in the efficient maintenance and conduct of the mail service? Our investigations disclose no such decision. But, it is said, the Supreme Court has never been called upon directly to decide the question of how far exclusion may go. True, but the decisions very definitely support the conclusion here reached, to-wit, that the exclusion must rest directly upon a regulation of the mails, that is, of the *use* of the mails—of the *thing* mailed—and not upon a regulation of the *user.*

* * * * * * * *

"Whether or not the right to send or receive matter through the mails actually owes its existence to the postal clause in the Constitution, it is certain that such a right would be a purely empty and abstract one were it not for the postal facilities supplied and maintained, by virtue of this clause, exclusively by the federal government. Nevertheless, this clause must be construed in the light of definite prohibitions in the Constitution. That is to say, 'what cannot be done directly because

of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. * * * Or, in other words, constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation.' *Fairbank* v. *United States,* 181 U. S. 283, 294, 300, 21 S. Ct. 648, 658, 45 L. ed. 862. 'If the means employed have no real substantial relation to public objects which government may legally accomplish—if they are arbitrary and unreasonable, beyond the necessities of the case—the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt.' *Union Bridge Co.* v. *United States,* 204 U. S. 364, 397, 27 S. Ct. 367, 378, 51 L. ed. 523.

* * * * * * * *

"* * * In the first *Child Labor Case* the question, succinctly stated, and which the Supreme Court answered in the negative, was this: May Congress, under the guise of regulating interstate commerce—a plenary power within its given sphere—prohibit transmission in interstate commerce of goods manufactured by child labor? Substitute for 'interstate commerce,' 'the mails' (parcel post), and we have, in principle, the very question presented now, to which the same answer must be given, unless it be erroneously conceded that the power of Congress to exclude from the mails is absolutely without limitation; that upon the exercise of such power, there must disappear those reserved powers of the states guaranteed by the Tenth Amendment, and that due process of law guaranteed by the Fifth Amendment. If Congress may thus employ the postal power, why may not, for example, the power to control the nation's currency, and patents and copyrights—both of the same plenary character—be simi-

larly employed, with the result that persons, when found to have offended against this or that regulatory measure having no relation, however, to the use of money, or to 'the progress of science and the useful arts,' would be denied completely the right either to spend, or to save any money, or to enjoy the fruits of their inventive or artistic talents.

"We are not dealing here with a mere question of legislative discretion. The facts are not debatable. If they were, it would not be permissible for this court to set up its opinion against the opinion of the lawmakers. *Radice* v. *New York,* 264 U. S. 292, 294, 44 S. Ct. 325, 68 L. ed. 690; *Stephenson* v. *Binford,* 287 U. S. 251, 272, 53 S. Ct. 181, 77 L. ed. 288, 87 A. L. R. 721.

"What has been said with respect to the inseparability of the multifarious provisions of the Public Utility Holding Company Act that bear generally upon the commerce clause, we find equally applicable to those that relate directly to the use of the mails and instrumentalities of interstate commerce. These reprisal provisions are so interwoven in the act as not only to render them incapable of separation, but also to leave no reasonable ground for assuming that Congress would have enacted the law without them."

In 1916, Dr. Lindsay Rogers, Professor of Political Science in the University of Virginia, prepared a study of constitutional expansion, entitled,

"The Postal Power of Congress,"

which was then published by Johns Hopkins University Press.

Some mention of this learned treatise has been made in the course of the consideration of this case, and by reason of the time that has elapsed since the publication thereof, the views therein expressed may be received without the criticism of present-day political taint.

We quote:

"* * * Any legislation excluding from the mails must apply directly to the *things* mailed, not the persons using the mails * * * the fact that the ends to be attained are unconnected with the use of the mails, would prevent the legislative fiat from being final (p. 176).

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty —indeed under a solemn duty—to look at the substance of things, whenever they enter upon an inquiry as to whether the legislature has transcended the limits of its authority. If therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution,"

—*Mugler* v. *Kansas,* 123 U. S. 623,

and,

"* * * are not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution."

—*Houston* v. *Moore,* 5 Wheat. 1.

This court has adhered to "the great principle that what cannot be done directly because of constitutional restriction, cannot be accomplished indirectly by legislation which accomplishes the same result."

—*Fairbank* v. *United States,* 181 U. S. 283.

We quote further from the Postal Power of Congress, *supra,* in closing this portion of the argument:

"The phrase is that of Grote, who, describing Athenian Democracy in the time of Kleisthenes, emphasized the necessity for * * * 'a perfect confidence

in the bosom of every citizen, amidst the bitterness of party contest, that the forms of the constitution will be no less sacred in the eyes of his opponents than his own.' Such constitutional morality he called 'a natural sentiment', as it exists in the United States, but these words will no longer be true if Congress may extend its control in the manner proposed, without waiting for a grant of authority in the manner provided in the Constitution.

"And if courts should permit such extension of federal control, enormous powers will, by judicial construction, be taken from the states and given over to the national legislature. For, as it is hardly necessary to remark, the denial of postal and interstate commerce facilities would be almost as efficacious as positive legislation; without using the mails and the channels of trade no business could successfully exist. If congressional control may be thus extended, every business and every individual needing to use the mails would become subject to federal regulation on the vague ground of public policy. The reserved powers of the states would then exist only by the sufferance of Congress, and the cardinal theory of the American system—that the federal government is one of enumerated powers—would become a cynical fiction."

II.

The Denial of Authority to Force Petitioner's Attendance by Subpoena.

At the time the respondent commenced this action in the District Court at New York City, the petitioner in response to a rule to show cause, challenged the jurisdiction for the reasons indicated at pages 6 and 7 hereof.

The objections there made (other than constitutional and the denial of jurisdiction by reason of petition for review then pending in the Circuit Court of Appeals upon which *certiorari* was denied in No. 639) may be summarized as denying:

(a) the authority of the respondent to issue a subpoena;

(b) the validity of the orders denying the right to withdraw petitioner's registration statement;

(c) the validity of the Commission's rule (release) No. 47, for the failure to publish as required by 19-(a) of the Act, and because the rule failed to include findings of fact showing the necessity for such rule, and finally because such rule is not authorized by the Act;

(d) the validity of the respondent's orders denying petitioner's motions to dismiss and withdraw his registration for the failure to support such orders by the necessary findings of fact, which would bring them within an exception to that part of Rule No. 47, which requires that the respondent's consent to an application to withdraw a registration statement shall be given with due regard to the public interest and the protection of investors.

These objections are so inter-related that a consideration thereof will be undertaken in a discussion of a general

denial of authority to require petitioner's attendance by subpoena.

A review of the proceedings before the Commission's Examiner on June 18th, 1935 (Appendix "D," pp. 83-87), and again on June 27th, 1935 (Appendix "E," pp. 88-96), will disclose that petitioner twice informed the Commission in unmistakable language, of his desire to withdraw his registration statement.

The record also shows that not a unit of the issue proposed in the registration statement has (or had) been sold; and that the trust, which was to issue such units, existed nowhere except in petitioner's mind, and his registration statement clearly informed the Commission of these facts.

When the Commission's telegram, quoted in the record, was received by petitioner, informing petitioner that the Commission was about to embark upon a "fishing expedition" upon other transactions in which petitioner is, or had been interested, he properly and promptly elected to withdraw his registration statement.

The Commission denied this right.

The source of the Commission's power and authority is, of course, the statute. The statute does not prohibit the withdrawal of the registration statement; nor does it say that it may not be withdrawn without the consent of the Commission. It is silent upon this subject. But the Commission promulgated a rule (which is called a release) numbered 47, printed in its entirety as Appendix "H," pp. 105-110, which, in part, provides:

> "Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto.. * * * *Such*

consent shall be given by the Commission with due regard to the public interest and the protection of investors." (Italics ours.)

Congress, by failing to make any provision governing the withdrawal of registration statements, undoubtedly intended that the general rules of law and procedure governing such matters should apply. Let us see what they are.

Hearings before this Commission certainly do not rise to greater dignity than suits before a court. Registrants before the Commission are still citizens of the United States —not subjects of the Commission.

District Judge EVANS, speaking for the Fifth Circuit Court of Appeals in *Cybur Lumber Co.* v. *Erkhart*, 247 Fed. 284, said:

> "The general rule is that a plaintiff may discontinue his action as a matter of course before hearing."

He then points out certain exceptions, as where the substantial rights of the defendant would be injuriously affected by the dismissal.

The United States Supreme Court in *Barrett* v. *Virginia Railway Co.*, 250 U. S. 473, held that,

> "At common law, as generally understood and applied, a nonsuit could be taken freely at any time before verdict if not indeed before judgment."

And the court said that,

> "The right is substantial."

The Supreme Court again spoke upon this subject in *Ex parte Skinner & Eddy Corp.*, 265 U. S. 87, and said:

> "At common law a plaintiff has an absolute right to discontinue or dismiss his suit at any stage of the

proceedings prior to verdict or judgment, and his right has been declared to be substantial."

And the court further said:

"The right to dismiss, if it exists, is absolute. It does not depend on the reasons which the plaintiff offers for his action."

See:

Thomson-Houston Electric Co. v. *Holland,* (D. C.) 160 Fed. 768.

We submit to the Court that it would require a legislative enactment, specific and clear in its terms, to prohibit the withdrawal of a registration statement, when such withdrawal is sought before any rights of the public have attached by the sale of securities described in the statement; that Congress has not granted any such authority as the Commission seeks to exercise; that it has not authorized the Commission to so legislate, and, if the act attempts to give the Commission such power, it is void as a prohibited delegation of legislative powers.

—*Panama Refining Co.* v. *Ryan,* 293 U. S. 388;

Schecter Poultry Corp. v. *United States,* 55 Sup. Ct. Rep. 837.

The record shows that the Commission, to support its denial of appellant's right to withdraw his registration statement, leans upon Release 47 *(supra);* but, borrowing a phrase from Mr. Justice CARDOZO, "the prop was insecure and warning of its insecurity was not lacking."

We urge,

First. The rule is not authorized by the statute. The Commission is authorized by section 19(a) of the statute to make such rules and regulations as are necessary to

carry out the provisions of Title I of the act. The refusal of the right to withdraw petitioner's registration statement thwarts the clear intention of Congress and runs counter to the plain and unambiguous terms of the act. It necessarily follows that the rule is in derogation of the common law and a prohibited delegation of legislative power if authorized by the statute.

Second. Rules and regulations of the Commission have the force and effect of laws. It is a crime to violate them. The penalty for such violation is drastic and the punishment severe. Congress was not willing to subject a citizen to such drastic penalties and severe punishments, without some safeguard of his rights. So it provided in section 19(a) that:

> "The rules and regulations of the Commission shall be effective upon publication in the manner in which the Commission shall prescribe."

Therefore, a prerequisite to the effectiveness of any rule or regulation of the Commission is, *first,* the adoption by it of a plan prescribing the manner in which its rules and regulations shall be published and, *second,* publication of the rule or regulation in the prescribed manner. Of course, the manner of the publication must be such that it will give the public notice of the rule or regulation.

An examination of the releases given out by the Commission fails to disclose the adoption of any plan or rule by the Commission prescribing the manner in which its rules and regulations shall be published. If it has adopted any such plan or rule it remains concealed in its own bosom. Did not Congress also intend by the wording of this act that the public be apprised of the manner in which the Com-

mission's rules and regulations would be published? Unless the public has such information, how may it know when the rules and regulations are effective? When Congress gives a board or commission the right by rule or regulation to make illegal the doing of something that has been legitimate and legal as far back as history tells the story of man, and the doing of the act, after promulgation of such rule, is made punishable by heavy fine and severe imprisonment, does not due process of law require that such rule be made known to the citizen before it becomes effective?

Is the citizen required to perform the almost impossible task of daily checking the files of innumerable bureaus at Washington—to say nothing of those of this state—or act at his peril?

Release No. 5 of July 6, 1933 (printed in its entirety in Appendix "G," pp. 102-104), is the Commission's only release (prior to Release No. 47, quoted *supra)* which even remotely deals with the subject, and it falls far short of the statutory requirement. It fails to provide any manner in which the rules and regulations shall be published. It merely attempts to approve a set of "experimental" rules.

Rule 47, *supra,* appears to have had no official proclamation or publication and the Commission relies upon it as its authority to deprive respondent of what the Supreme Court says is a substantial common-law right. Certainly this procedure is a departure from our time-honored traditions.

The statute does not intimate that Congress so intended; much less does the statute express such intent in ex-

plicit language. Due process of law stands between this rule and its enforcement.

—*Champlin Refining Co.* v. *Corporation Com.*, 286 U. S. 210.

The rule is not based upon any finding of facts which show that it is necessary to serve the "public interest and protect investors." So for another reason it totally fails.

—*Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

Thus the Commission's contention that under Rule 47 *(suprà)* it had the right to prevent petitioner from withdrawing his registration statement is supported by nothing more substantial than thin air.

Third. Assuming, but not conceding, that Rule 47 *(supra)* is authorized by the act and that it has been issued and published pursuant to the act, the Commission's order denying the petitioner the right to withdraw his registration statement is nevertheless void, because the rule provides that "such consent shall be given by the Commission with due regard to the public interest and the protection of investors." This requires the exercise of sound discretion by the Commission. The order denying the right to withdraw a registration statement must be based upon facts which show that it would be inimical to the public interest and the protection of investors; otherwise it is arbitrary, capricious and void.

The complained of ruling was peremptory. If it was based upon an exercise of discretion, the discretion was plainly abused.

The Supreme Court, speaking through the Chief Justice, in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, said:

> "If a citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends upon determinations of fact, those determinations must be shown."

If the necessary finding of facts is lacking, the order is ineffective.

—*Wichita Railroad & Light Co.* v. *Public Utilities Com.*, 260 U. S. 48, 67 L. ed. 124.

It is a criminal offense to violate the orders of this Commission (Sec. 24).

In the lower court counsel for the Commission argued that if the petitioner were permitted to withdraw his registration statement, he might proceed with the sale of his securities without registration. That is not an answer. If he does so, Congress has provided the penalty. If he violates the law or the rules and regulations of the Commission, he may upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both (Sec. 24). If he violates the law or the regulations or is about to do so, the Commission may enjoin him (Sec. 20a).

They may not, however, hold him before the Commission and force him to proceed with a registration *examination* which he wishes to abandon.

The Commission holds to the view that it is mandatory upon the petitioner to submit to a hearing and examination, at its pleasure, once he has filed a registration statement. This contention finds no support in the act. Section 8(d) provides that:

"If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after *opportunity* for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, *issue a stop order suspending the effectiveness of the registration statement.*" (Our italics.)

To say that this section of the act requires one who files a registration statement to appear at such hearing and defend himself against an innuendo which the Commission says it has "reason to believe", is to do violence to the plain language of the section. The act provides that the Commission, before issuing a stop order, must give the registrant an *opportunity* for hearing. It does not command the registrant to take advantage of the opportunity.

He may let the hearing go by default and permit the stop order to go against him without complaint. It is his privilege to select the road upon which he will travel. If he defaults, the Commission may and should issue a stop order. It could do no more if it *conducted a thousand hearings* and made *as many examinations.*

Section 8(e) does not strengthen the Commission's position. It provides that the Commission is empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). Therefore, subsections (d) and (e) must be considered together. Subsection (d) requires an opportunity for hearing. If the registrant takes advantage of the opportunity and

forces a hearing, then the Commission may proceed under subsection (e); otherwise it may not—for there is no occasion for any further proceeding.

All that the Commission can do in any event with respect to an effective registration statement, is to issue a stop order suspending its effectiveness and that specific power was particularly granted to respondent where a registrant "refuses to permit the making of an examination."

We quote from section 8(e):

> "* * * if the issuer shall fail to co-operate or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order."

Thus, the power of the respondent to issue a stop order has been fully safeguarded by Congress.

We submit, that it is manifest, that Congress never intended the respondent to have the power which it asserts here—to reach out, select an individual registrant and force him to actively participate in a "stop order" proceeding.

If Congress had otherwise intended, the phrase,

> "* * * if the issuer shall * * * *refuse to permit* the making of an examination * * *," (Sec. 8(e))

would never have been employed.

Manifestly, therefore, it is entirely optional on the part of a registrant whether he will avail himself of the "opportunity for hearing" which it is the duty of the respondent to "afford" him upon notice, or submit to a stop order under subdivision (e).

Obviously, the Commission cannot commence to function as a *quasi*-judicial body until a registration statement

has been filed before it. Its *quasi*-judicial functions commence when it makes an examination of the registration statement itself and determines whether on its face such registration statement is in conformity with the statute. If it appears to be deficient in any material respect, the Commission, after affording an opportunity for hearing, may *order an amendment*, enter a *refusal* order, or enter a *stop* order. *It may do no more.*

We do not contend that the Commission's powers in respect to a false registration statement cease upon the issuance of a stop order. The contrary we submit is quite clear. This is so, because section 19(b) authorizes the respondent to proceed affirmatively in the matter of *investigations* which in its opinion are necessary and proper for the enforcement of the act,

It is a criminal offense for any person to wilfully file a registration statement which is incomplete or false. (Sec. 24)

Should the Commission have reason to believe that any person is guilty of such an offense, it is then authorized to proceed affirmatively and make a complete investigation of the facts under section 19(b), and

> "• • • for the purpose of all *investigations* • • • any member of the Commission or any officer or officers designated by it are empowered to administer oaths • • • *subpoena witnesses,* take evidence, and *require* the production of any books, papers, or other documents, which the Commission deems relevant or material to the inquiry."

The foregoing grant of the power to subpoena witnesses, to require the production of books and papers *and*

take evidence, is the only such power conferred upon the respondent. Clearly, such power is limited to *investigations.*

But the respondent was not pursuing an investigation of the petitioner—it was acting upon his registration statement—its proceedings were confined to the provisions and the scope of section 8, where no such power of subpoena has been conferred, or as we have clearly shown, is necessary to enable the respondent to enter a *stop* order.

Reference to the record clearly establishes that the respondent was not pursuing an investigation under the authority of section 19(b), but was acting upon the petitioner's registration statement. This clearly appears in a document which was printed in the record (Case No. 639, p. 139) which is on file in the office of the clerk of this court. We reprint it here:

> "*Commission Minute Authorizing the Institution of Stop Order Proceedings.*
>
> Meeting of Securities and Exchange Commission, May 20, 1935, 3:30 P.M.
>
> "Upon the recommendation of the Registration Division and the Legal Division, and it appearing to the Commission that there are reasonable grounds for believing that the registration statement filed by J. Edward Jones (File 2-1408) includes untrue statements of material facts and omits to state material facts required to be stated therein or necessary to make the statements therein not misleading, the Commission directed that stop order proceedings be instituted against said registration statement."

The entry of this order certainly prevented the registration statement of the petitioner becoming effective (May 24, 1935) four days later, as the Commission has contended.

When the Commission made its order on May 25th, 1935, and its subsequent orders upon the subject-matter, such orders were captioned in each instance, as,

"In the Matter of Registration Statement of J. Edward Jones, File No. 2-1408."

The proceedings before the respondent, which were held on the 18th of June and the 27th of June, 1935, are also entitled,

"In the Matter of the Registration Statement of J. Edward Jones, File No. 2-1408-1."

Notwithstanding the record, respondent now assumes the position stated on page 18 of its memorandum to this court on *certiorari*, that,

> "Furthermore, the proceedings before the Commission seem to have been directed not only at a potential stop order under Section 8, but also at an investigation under section 19(b)."

In its opinion, the Circuit Court of Appeals disregarded petitioner's argument, and held that,

> "* * * a proceeding under Section 8(d) is such an investigation."

Such an interpretation does plain violence to the structure and manifest intent of the act.

The conclusion of the Circuit Court, to the effect that petitioner's opportunity to show cause why his registration statement should not be suspended, could be *converted* into an *investigation* for the purpose of detecting a criminal violation of the act, manifestly denies due process of law.

If the Commission is seeking to accomplish such purpose then it is pursuing a course vigorously condemned by

the United States Supreme Court in the opinion of Mr. Justice HOLMES in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 32 A. L. R. 786, where he said:

> "The mere facts of carrying on a commerce not confined within state lines, and of being organized as a corporation, do not make men's affairs public, as those of a railroad company now may be. *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33, 43, 62 L. ed. 135, 140, 38 Sup. Ct. Rep. 30. Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause, are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 53 L. ed. 253, 29 Sup. Ct. Rep. 115; and as to correspondence, even in the case of a common carrier, in *United States* v. *Louisville & Nashville Railroad Co.*, 236 U. S. 318, 335, 59 L. ed. 598, 606, P. U. R. 1915-B, 247, 35 Sup. Ct. Rep. 363."

It will be helpful to inquire into the motives which impel the Commission to its course of action.

Reference to the Commission's specification of the al-

leged deficiencies of petitioner's registration statement and to the pleading it filed in the District Court (R. 2-15, inc.), clearly indicates that respondent desires to examine petitioner upon matters pertaining to other business not connected with the proposed securities covered by the registration statement.

If the Commission is not actuated by such motive in this proceeding and is only desirous of serving the public interest and protecting investors, it is difficult to understand why it has not issued a stop order based upon the petitioner's refusal to co-operate or permit the examination. It is also difficult to comprehend why the Commission has so zealously pursued a course of action which it contends enabled the registration statement to become effective despite the petitioner's efforts to abandon the entire project before he has even offered his proposed issue for sale.

We respectfully submit, therefore, that if the Commission be permitted to retain jurisdiction of petitioner and conduct the hearing which it proposes to conduct, it would in no way serve the public interest or protect investors; it would not protect the postal service, nor facilitate or purify the movement of commodities in interstate commerce; it would accomplish no useful purpose; it would (as it has already) continue to cost petitioner large sums of money and the sacrifice of valuable time; all of which would but be a usurpation of power not conferred by the statute, and an invasion of states' rights in violation of the 10th Amendment to the Federal Constitution, as well as a denial of due process of law in violation of the Fifth Amendment to the Federal Constitution, and finally an invasion of the protection against unlawful search and seizure guaranteed by the 4th Amendment.

Conclusion.

The petitioner respectfully submits, that:

(a) the act is unconstitutional and void;

(b) there is no proceeding now pending before the Commission to which an order to appear and testify can attach;

(c) the subpoena of the Commission is unauthorized by the statute and cannot be enforced;

(d) the proposed proceedings of the Commission are in violation of the powers conferred upon it by the statute;

(e) Rule No. 47 is void, for the failure to recite the facts therein upon which it is founded, and for the further failure to provide a manner of legal publication for this as well as all other rules of the Commission;

and prays that the judgment and decree of the Circuit Court of Appeals for the Second Circuit be reversed in its entirety.

Respectfully submitted,

James M. Beck,
Washington, D. C.,
Bainbridge Colby,
New York, N. Y.,
Harry O. Glasser,
Enid, Oklahoma,
J. N. Saye,
Longview, Texas,
H. I. Fischbach,
New York, N. Y.,
Counsel for Petitioner.

INDEX TO APPENDICES.

PAGE

Appendix A—
Opinion of the Circuit Court of Appeals..... 74

Appendix B—
Securities Act of 1933, inserted between pages...80-81

Appendix C—
Document withdrawing registration statement presented to Securities and Exchange Commission on June 18, 1935..... 81

Appendix D—
Excerpts from minutes of proceedings before Securities and Exchange Commission at Washington, D. C., June 18, 1935..... 83

Appendix E—
Excerpts from minutes of proceedings of June 27, 1935, J. Edward Jones matter, file No. 2-1408-1... 88

Appendix F—
Assignment of errors..... 96

Appendix G—
Release No. 5 of the Securities and Exchange Commission..... 102

Appendix H—
Release No. 47 of the Securities and Exchange Commission..... 105

APPENDIX A.

Opinion of the Circuit Court of Appeals.

MANTON, Circuit Judge.

Appellant filed a registration statement covering a forthcoming issue of participation trust certificates pursuant to Sec. 6 of the Securities Act of 1933 as amended (48 Stat. 74; 48 Stat. 905; 15 U. S. C. Sec. 77a) with the appellee. It was filed May 4, 1935, and on May 23, 1935, notice of a hearing on this statement was sent to the appellant by the Commission. On June 18th a hearing was had and appellant attempted to withdraw his registration statement which was denied by the officer conducting the hearing for the Commission. This ruling was based on the regulation of the Commission providing:

> "Any registration statement or any amendment thereof may be withdrawn upon the request of the registrant if the Commission consents thereto * * * which consent shall be given by the Commission with due regard to the public interest and the protection of investors."
>
> (Release No. 47 of the Federal Trade Commission, Sept. 22, 1933.)

Appellant filed a petition to review the action of the Commission refusing permission of withdrawal of his registration statement. The appellee moves to dismiss the petition to review contending that it was prematurely brought since no order had been entered by the Commission within the meaning of Sec. 9 (a) of the Securities Act (48 Stat. 80; 15 U. S. C. 77i) and that therefore the court has no jurisdiction to entertain this petition. Section 9 (a) grants [fol. 181] any person aggrieved by an order of the Commission a review thereof in the Circuit Court of Appeals of the United States within any circuit wherein such person resides or has his place of business. Since no stay was granted by this court pursuant to Sec. 9 (b) of the Securities Act, the Commission, on July 3, 1935, filed a petition

in the District Court for the Southern District of New York, pursuant to Sec. 22 (b) of the Act (48 Stat. 86; 15 U. S. C. Sec. 77v), for an order directing the appellant to appear and testify before an officer of the Commission pursuant to a subpoena which the Commission had previously served on the appellant and which he had failed to obey. The appellant appeared in opposition to this petition; a hearing was had and the court granted the order directing the appellant to appear and testify in the matter of the registration statement he had filed. The respondent therein named appealed to this court. The two causes have been consolidated.

The appellee moves to dismiss the petition to review urging that no order has been entered which the petitioner might review in this court. The orders of the Commission referred to are to be found in Secs. 8 (b), 8 (d) and 8 (e), all preceding Sec. 9, which provides for a review of the orders. Section 8 (b) authorized an order refusing to permit a registration statement to become effective until it has been amended as required in the order. Sections 8 (d) and 8 (e) provide for the entry of a stop order suspending the effectiveness of the registration statement at any time. Notice of hearings and proceedings under these sections must be given and the Commission must make a final determination of fact before such orders may be entered. They would then become final orders of the Commission. The order sought here to be reviewed is not of either type. It [fol. 182] is an interlocutory ruling in the proceeding and hearing which was within the control of the Commission as a tribunal until some final determination was made. Interlocutory orders of a court are not receivable except where it has been provided by statutory authority. Illustrations of this is the jurisdiction of this court provided for by Sec. 128 of the Judicial Code (28 U. S. C. 225) which provides that the Circuit Court of Appeals may review only final decisions of the district court and certain enumerated interlocutory orders or decrees granting, refusing or modifying interlocutory injunctions and receiverships or involving extraordinary relief. *Herrup* v. *Stoneham,* 15

Fed. 2, 49 C. C. A. 2) *France & Canada S. S. Co.* v *French Republic,* 285 Fed. 290 (C. C. A. 2); *Gas & Electric Securities Co.* v. *Manhattan & Queens Traction Corp.,* 266 Fed. 625, 632 (C. C. A. 2). These principles have been applied to interlocutory rulings of administrative tribunals. *Chamber of Commerce of Minneapolis* v. *Fed. Trade Comm.,* 280 Fed. 45 (C. C. A. 8). We do not think that Congress intended by any provision of this act to permit reviews by the Circuit Courts of Appeals of interlocutory and procedural orders entered by the Securities and Exchange Commission.

The stop order hearings authorized by the Act are summary proceedings for the protection of investors against misrepresentation and omissions of a registration statement. We think it is when a final order is entered as a result of the hearings that the act intends the appellant might have a right of review of that determination. No order under Sec. 8 (b) was entered and the registration here became effective May 24th. It remained effective since no stop order was issued under Sec. 8 (d). Under such circumstances the denial of a motion to withdraw the registration reflected no injury upon the appellant. The [fol. 183] motion to dismiss the petition to review is granted.

Appellant appeals from an order directing him to appear and testify before the Commission regarding his registration statement. It was entered pursuant to Sec. 22 (b).

The answer of the appellant sets up the invalidity of the statute on constitutional grounds and also denies jurisdiction of the Commission to make the application after his motion to dismiss. If he could withdraw his registration by mere request, it would end the effect of filing it and there is no authority under Sec. 19 (b) to issue the Commission subpoena and it could not be enforced by order of the district court under Sec. 22 (b).

The appellant contends that the Securities Act of 1933 as amended is unconstitutional because the securities are not subjects of commerce. But the power of Congress as

it relates to control over the use of the mails, is fully sustained by the cases which have considered the mail fraud statutes. *Badders* v. *United States,* 240 U. S. 391; *Public Clearing House* v. *Coyne,* 194 U. S. 497; *In re Rapier,* 143 U. S. 110; *Ex parte Jackson,* 96 U. S. 727. It is not an unreasonable method of preventing the use of the mails to promote and consummate the sales of misrepresented securities, to require that all securities, before mails are used, must be registered. *Lewis Publishing Co.* v. *Morgan* (229 U. S. 288), upheld the exaction of certain information as a condition precedent to a newpaper's classification as second class matter. Congress clearly had the power to enact the provision excluding securities from the use of the mails unless a true statement describing them was filed in a public office in Washington. The postal power, like all other powers of Congress, is subject to the limitations imposed by the Bill of Rights *(Milwaukee Pub.* v. *Burleson,* 255 U. S. 407, 430; *Burton* v. *United States,* 202 U. S. 344, 371). But admitting such limitation, we think there was sufficient authority for the mail sections of the Securities Act. The claim that the registration requirements violated due process of law is without force. Registration of all securities whether good or bad, required by state blue sky laws have been upheld as no violation of the due process clause. *Hall* v. *Geiger-Jones,* 242 U. S. 539; *Caldwell* v. *Sioux Falls Stock Yards Co.,* 42 U. S. 559; *Merrick* v. *Halsey & Co.,* 242 U. S. 568. Similar registration required of securities within the jurisdiction of the Federal government would likewise be clear of the inhibitions of due process in the Fifth Amendment. If the act is constitutional so far as it forbids the use of the mails, that is sufficient for our present consideration. Section 26 of the Act contains a provision that the invalidity of one part shall not invalidate the rest.

Another constitutional objection advanced is that there was an unconstitutional delegation of power by Congress in leaving the determination of rules to the Commission. *Schechter Poultry Corp.* v. *United States* (295 U. S. 495) and *Panama Refining Co.* v. *Ryan* (293 U. S. 388) did not decide that any delegation of authority to control details

of administration was void. They expressly recognized that details of a subordinate nature may be supplied by administrative regulations. The delegation of authority to the commission was merely power to supply these necessary flexible details. Since the powers delegated are of this character, they appear to be within the ruling deciding that similar delegation to the Federal Trade Commission was not unlawful. *Avent* v. *United States*, 266 U. S. 127; *Interstate Commerce Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194. The power to make rules regulating registration is very different from that in the case of the *Panama* [fol. 185] *Refining Co.* case, *supra*, where there was "no criterion to govern the President's course," and from that in the *Schechter* case, *supra*, where the delegation was similar. In both these cases, the executive received the power to affect fundamental provisions of the law. This is entirely different from the power which was set up by an administrative mechanism. Further, those cases seem to have held that there was no necessity for the broad delegation of power. Such cannot be said of the Securities Act. See: 1935, 48 Harvard Law Review, 798. We think that Sec. 19 (a) of the Act (48 Stat. 85, 15 U. S. C. 77s) is constitutional.

The action of the Commission in refusing to allow the withdrawal was proper. Section 19 (a) of the statute authorized the Commission to make such rules and regulation as shall be necessary to carry out the provisions of the title. It would seem necessary to the prevention of the use of the facilities of the mail in the promotion of securities about which no responsible information is on file, to deny a desired withdrawal. The commission properly argues that an unlimited privilege of withdrawal would have the effect of allowing registrants whose statements are defective, to withdraw before a stop order was issued and then to submit another statement with slight changes. This would present a real administrative difficulty and for this reason the Commission's Release 47 seems within the authority granted by Section 19 (a). Moreover, the right of the appellant to withdraw his registration may properly be conditioned by

the Commission in view of the public interest. *In re J. R. Palmenberg Sons*, 76 Fed. 2, 935 (C. C. A. 2); *Young* v. *So. Pac.*, 25 Fed. 2, 630 (C. C. A. 2); *American Zylonite Co.* v. *Celluloid Mfg. Co.*, 32 Fed. 809.

The Commission's authority to subpoena the appellant [fol. 186] and compel him to testify seems clear. Appellant advanced the unconstitutionality of the Securities Act and thus a ruling on this is necessary, even though the Commission's denial of the petition to withdraw is not reviewable by us. The appellee's right to the power to subpoena witnesses for examination is based upon Sections 8 (d), 8 (e) and 19 (b). Appellant urges there is an operative distinction between "investigation" as used in Section 19 (b) and "examination" as it is referred to in Secs. 8 (d) and 8 (e) and contends that Sec. 8 (d) and Sec. 8 (e) do not authorize the compulsion of witnesses to attend an examination with any greater sanction than the issuance of a stop order. The distinction between "examination" and "investigation" is not as potent as argued by appellant. Section 22 (b) of the Act authorizing a district court to order the appearance of a contumacious witness, speaks of "examiners" designated by the Commission. If the appellant's contention was sound, those conducting "investigations" would be "examiners" and those conducting "examinations" within Sec. 8 (d) and Sec. 8 (e) would not be "examiners". Moreover, the power granted by Sec. 19 (b) is for an investigation "necessary and proper" for the enforcement of the act. A proceeding under Section 8 (d) is such an investigation. It is a violation of the act for a registrant to include in a registration statement filed with the Commission, an untrue statement of a material fact or an omission of a material fact which should be stated. If such conduct is wilful it is a criminal offense under Sec. 24. The obvious investigation for the purpose of detecting these violations is the hearing provided for in Sec. 8 (d).

The contention that the appellee's only sanction to compel attendance at the hearings is the issuance of a stop order is erroneous. The appellee is authorized to issue

[fol. 187] the stop order if the issuer, or underwriter, refused to cooperate. If this were the limit of the Commissioner's authority, an underwriter could force a stop order which would injure the innocent issuer and there would be no compulsory power over third persons at all since the stop order is authorized only if the issuer or underwriter prove unwilling to cooperate. Yet the appellee is empowered to examine the issuer, underwriter or any other person. A proper conduct of a hearing under Sections 8 (d) and 8 (e), which determines the rights of the parties, requires that the administrative body conducting the hearing, have complete power to compel production of any evidence necessary to the final determination. Only a stop order could have ended the effectiveness of the registration here and the hearing to determine whether to issue one was authorized and the issuance of a subpoena was lawful.

The court below properly directed the appellant's attendance as a witness.

Order affirmed.

Filed Nov. 4, 1935.

APPENDIX B.

[PUBLIC—No. 22—73D CONGRESS]

[H.R. 5480]

AN ACT

To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

SHORT TITLE

SECTION 1. This title may be cited as the "Securities Act of 1933".

DEFINITIONS

SEC. 2. When used in this title, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in property, tangible or intangible, or, in general, any instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing.

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale", "sell", "offer to sell", or "offer for sale" shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; except that such terms shall not include preliminary negotiations or agreements between an issuer and any underwriter. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer

or of another person, which right cannot be exercised until some future date, shall not be deemed to be a sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security.

(4) The term "issuer" means every person who issues or proposes to issue any security or who guarantees a security either as to principal or income; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used.

(5) The term "Commission" means the Federal Trade Commission.

(6) The term "Territory" means Alaska, Hawaii, Puerto Rico, the Philippine Islands, Canal Zone, the Virgin Islands, and the insular possessions of the United

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 6, and includes any amendment thereto and any report, document, or memorandum accompanying such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio, which offers any security for sale; except that (a) a communication shall not be deemed a prospectus if it is proved that prior to such communication a written prospectus meeting the requirements of section 10 was received, by the person to whom the communication was made, from the person making such communication or his principal, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 10 may be obtained and, in addition, does no more than identify the security, state the price thereof, and state by whom orders will be executed.

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwrit-

ing of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

EXEMPTED SECURITIES

SEC. 3. (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

(1) Any security which, prior to or within sixty days after the enactment of this title, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days;

(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories exercising an essential governmental function, or by any corporation created and controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States, or by any national bank, or by any banking institution organized under the laws of any State or Territory, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; or any security issued by or representing an interest in or a direct obligation of a Federal reserve bank;

(3) Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(4) Any security issued by a corporation organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual;

(5) Any security issued by a building and loan association, homestead association, savings and loan association, or similar institution, substantially all the business of which is confined to the making of loans to members (but the foregoing exemption shall not apply with respect to any such security where the issuer takes from the total amount paid or deposited by the purchaser, by way of any fee, cash

value or other device whatsoever, either upon termination of the investment at maturity or before maturity, an aggregate amount in excess of 3 per centum of the face value of such security), or any security issued by a farmers' cooperative association as defined in paragraphs (12), (13), and (14) of section 103 of the Revenue Act of 1932;

(6) Any security issued by a common carrier which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended;

(7) Certificates issued by a receiver or by a trustee in bankruptcy, with the approval of the court;

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia.

(b) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000.

EXEMPTED TRANSACTIONS

SEC. 4. The provisions of section 5 shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not with or through an underwriter and not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the last date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders.

(3) The issuance of a security of a person exchanged by it with its existing security holders exclusively, where no commission or other remuneration is paid or given directly or indirectly in connection with such exchange; or the issuance of securities to the existing security holders or other existing creditors of a corporation in the process of a bona fide reorganization of such corporation under the supervision of any court, either in exchange for the securities of such

security holders or claims of such creditors or partly for cash and partly in exchange for the securities or claims of such security holders or creditors.

PROHIBITIONS RELATING TO INTERSTATE COMMERCE AND THE MAILS

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 10.

(c) The provisions of this section relating to the use of the mails shall not apply to the sale of any security where the issue of which it is a part is sold only to persons resident within a single State or Territory, where the issuer of such securities is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory.

REGISTRATION OF SECURITIES AND SIGNING OF REGISTRATION STATEMENT

SEC. 6. (a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of

this title. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

(b) At the time of filing a registration statement the applicant shall pay to the Commission a fee of one one-hundredth of 1 per centum of the maximum aggregate price at which such securities are proposed to be offered, but in no case shall such fee be less than $25.

(c) The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place upon the receipt thereof, but the filing of a registration statement shall not be deemed to have taken place unless it is accompanied by a United States postal money order or a certified bank check or cash for the amount of the fee required under subsection (b).

(d) The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.

(e) No registration statement may be filed within the first forty days following the enactment of this Act.

INFORMATION REQUIRED IN REGISTRATION STATEMENT

SEC. 7. The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement. If any such person is named as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

TAKING EFFECT OF REGISTRATION STATEMENTS AND AMENDMENTS THERETO

SEC. 8. (a) The effective date of a registration statement shall be the twentieth day after the filing thereof, except as hereinafter provided, and except that in case of securities of any foreign public authority, which has continued the full service of its obligations in the United States, the proceeds of which are to be devoted to the refunding of obligations payable in the United States, the registration statement shall become effective seven days after the filing thereof. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed; except that an amendment filed with the consent of the Commission, prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement.

(b) If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days after such notice by personal service or the sending of such telegraphic notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) or upon the date of such declaration, whichever date is the later.

(c) An amendment filed after the effective date of the registration statement, if such amendment, upon its face, appears to the Commission not to be incomplete or inaccurate in any material respect, shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

(d) If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order the Commission shall so declare and thereupon the stop order shall cease to be effective.

(e) The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access

to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

(f) Any notice required under this section shall be sent to or served on the issuer, or, in case of a foreign government or political subdivision thereof, to or on the underwriter, or, in the case of a foreign or Territorial person, to or on its duly authorized representative in the United States named in the registration statement, properly directed in each case of telegraphic notice to the address given in such statement.

COURT REVIEW OF ORDERS

SEC. 9. (a) Any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

INFORMATION REQUIRED IN PROSPECTUS

SEC. 10. (a) A prospectus—

(1) when relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of Schedule A;

(2) when relating to a security issued by a foreign government or political subdivision thereof shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of Schedule B.

(b) Notwithstanding the provisions of subsection (a)—

(1) when a prospectus is used more than thirteen months after the effective date of the registration statement, the information in the statements contained therein shall be as of a date not more than twelve months prior to such use.

(2) there may be omitted from any prospectus any of the statements required under such subsection (a) which the Commission may by rules or regulations designate as not being necessary or appropriate in the public interest or for the protection of investors.

(3) any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(4) in the exercise of its powers under paragraphs (2) and (3) of this subsection, the Commission shall have authority to classify prospectuses according to the nature and circumstances of their use, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate to such use and consistent with the public interest and the protection of investors.

(c) The statements or information required to be included in a prospectus by or under authority of subsection (a) or (b), when written, shall be placed in a conspicuous part of the prospectus in type as large as that used generally in the body of the prospectus.

(d) In any case where a prospectus consists of a radio broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe. The Commission may by rules and regulations require the filing with it of forms of prospectuses used in connection with the sale of securities registered under this title.

CIVIL LIABILITIES ON ACCOUNT OF FALSE REGISTRATION STATEMENT

SEC. 11. (a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the

time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

(b) Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1), and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at

the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, and that such part of the registration statement fairly represented the statement of the expert or was a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true, and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, and that such part of the registration statement fairly represented the statement made by the official person or was a fair copy of or extract from the public official document.

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a person occupying a fiduciary relationship.

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) The suit authorized under subsection (a) may be either (1) to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or (2) for damages if the person suing no longer owns the security.

(f) All or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless

the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

CIVIL LIABILITIES ARISING IN CONNECTION WITH PROSPECTUSES AND COMMUNICATIONS

SEC. 12. Any person who—

(1) sells a security in violation of section 5, or

(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

LIMITATION OF ACTIONS

SEC. 13. No action shall be maintained to enforce any liability created under section 11 or section 12 (2) unless brought within two years after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12 (1), unless brought within two years after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12 (1) more than ten years after the security was bona fide offered to the public.

CONTRARY STIPULATIONS VOID

SEC. 14. Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

LIABILITY OF CONTROLLING PERSONS

SEC. 15. Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable.

ADDITIONAL REMEDIES

SEC. 16. The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

FRAUDULENT INTERSTATE TRANSACTIONS

SEC. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 3 shall not apply to the provisions of this section.

STATE CONTROL OF SECURITIES

SEC. 18. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

SPECIAL POWERS OF COMMISSION

SEC. 19. (a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting and trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Com-

mission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but insofar as they relate to any common carrier subject to the provisions of section 20 of the Interstate Commerce Act, as amended, the rules and regulations of the Commission with respect to accounts shall not be inconsistent with the requirements imposed by the Interstate Commerce Commission under authority of such section 20. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe.

(b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

INJUNCTIONS AND PROSECUTION OF OFFENSES

SEC. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the Supreme Court of the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

(c) Upon application of the Commission the district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia, shall also have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this title or any order of the Commission made in pursuance thereof.

HEARINGS BY COMMISSION

SEC. 21. All hearings shall be public and may be held before the Commission or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

JURISDICTION OF OFFENSES AND SUITS

SEC. 22. (a) The district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

(b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

UNLAWFUL REPRESENTATIONS

SEC. 23. Neither the fact that the registration statement for a security has been filed or is in effect nor the fact that a stop order is

not in effect with respect thereto shall be deemed a finding by the Commission that the registration statement is true and accurate on its face or that it does not contain an untrue statement of fact or omit to state a material fact, or be held to mean that the Commission has in any way passed upon the merits of, or given approval to, such security. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing provisions of this section.

PENALTIES

SEC. 24. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

JURISDICTION OF OTHER GOVERNMENT AGENCIES OVER SECURITIES

SEC. 25. Nothing in this title shall relieve any person from submitting to the respective supervisory units of the Government of the United States information, reports, or other documents that are now or may hereafter be required by any provision of law.

SEPARABILITY OF PROVISIONS

SEC. 26. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SCHEDULE A

(1) The name under which the issuer is doing or intends to do business;

(2) the name of the State or other sovereign power under which the issuer is organized;

(3) the location of the issuer's principal business office, and if the issuer is a foreign or territorial person, the name and address of its agent in the United States authorized to receive notice;

(4) the names and addresses of the directors or persons performing similar functions, and the chief executive, financial and accounting officers, chosen or to be chosen if the issuer be a corporation, association, trust, or other entity; of all partners, if the issuer be a partnership; and of the issuer, if the issuer be an individual; and of the promoters in the case of a business to be formed, or formed within two years prior to the filing of the registration statement;

(5) the names and addresses of the underwriters;

(6) the names and addresses of all persons, if any, owning of record or beneficially, if known, more than 10 per centum of any class of stock of the issuer, or more than 10 per centum in the aggregate of the outstanding stock of the issuer as of a date within twenty days prior to the filing of the registration statement;

(7) the amount of securities of the issuer held by any person specified in paragraphs (4), (5), and (6) of this schedule, as of a date within twenty days prior to the filing of the registration statement, and, if possible, as of one year prior thereto, and the amount of the securities, for which the registration statement is filed, to which such persons have indicated their intention to subscribe;

(8) the general character of the business actually transacted or to be transacted by the issuer;

(9) a statement of the capitalization of the issuer, including the authorized and outstanding amounts of its capital stock and the proportion thereof paid up, the number and classes of shares in which such capital stock is divided, par value thereof, or if it has no par value, the stated or assigned value thereof, a description of the respective voting rights, preferences, conversion and exchange rights, rights to dividends, profits, or capital of each class, with respect to each other class, including the retirement and liquidation rights or values thereof;

(10) a statement of the securities, if any, covered by options outstanding or to be created in connection with the security to be offered, together with the names and addresses of all persons, if any, to be allotted more than 10 per centum in the aggregate of such options;

(11) the amount of capital stock of each class issued or included in the shares of stock to be offered;

(12) the amount of the funded debt outstanding and to be created by the security to be offered, with a brief description of the date, maturity, and character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a summarized statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(13) the specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(14) the remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the past year and ensuing year to (a) the directors or persons performing similar functions, and (b) its officers and other persons, naming them wherever such remuneration exceeded $25,000 during any such year;

(15) the estimated net proceeds to be derived from the security to be offered;

(16) the price at which it is proposed that the security shall be offered to the public or the method by which such price is computed and any variation therefrom at which any portion of such security is proposed to be offered to any persons or classes of persons, other than the underwriters, naming them or specifying the class. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(17) all commissions or discounts paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash,

securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made, in connection with the sale of such security. A commission paid or to be paid in connection with the sale of such security by a person in which the issuer has an interest or which is controlled or directed by, or under common control with, the issuer shall be deemed to have been paid by the issuer. Where any such commission is paid the amount of such commission paid to each underwriter shall be stated;

(18) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than commissions specified in paragraph (17) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, authentication, and other charges;

(19) the net proceeds derived from any security sold by the issuer during the two years preceding the filing of the registration statement, the price at which such security was offered to the public, and the names of the principal underwriters of such security;

(20) any amount paid within two years preceding the filing of the registration statement or intended to be paid to any promoter and the consideration for any such payment;

(21) the names and addresses of the vendors and the purchase price of any property, or good will, acquired or to be acquired, not in the ordinary course of business, which is to be defrayed in whole or in part from the proceeds of the security to be offered, the amount of any commission payable to any person in connection with such acquisition, and the name or names of such person or persons, together with any expense incurred or to be incurred in connection with such acquisition, including the cost of borrowing money to finance such acquisition;

(22) full particulars of the nature and extent of the interest, if any, of every director, principal executive officer, and of every stockholder holding more than 10 per centum of any class of stock or more than 10 per centum in the aggregate of the stock of the issuer, in any property acquired, not in the ordinary course of business of the issuer, within two years preceding the filing of the registration statement or proposed to be acquired at such date;

(23) the names and addresses of counsel who have passed on the legality of the issue;

(24) dates of and parties to, and the general effect concisely stated of every material contract made, not in the ordinary course of business, which contract is to be executed in whole or in part at or after the filing of the registration statement or which contract has been made not more than two years before such filing. Any management contract or contract providing for special bonuses or profit-sharing arrangements, and every material patent or contract for a material patent right, and every contract by or with a public utility company or an affiliate thereof, providing for the giving or receiving of technical or financial advice or service (if such contract may involve a charge to any party thereto at a rate in excess of $2,500 per year in cash or securities or anything else of value), shall be deemed a material contract;

(25) a balance sheet as of a date not more than ninety days prior to the date of the filing of the registration statement showing all of the assets of the issuer, the nature and cost thereof, whenever determinable, in such detail and in such form as the Commission shall prescribe (with intangible items segregated), including any loan in excess of $20,000 to any officer, director, stockholder or person directly or indirectly controlling or controlled by the issuer, or person under direct or indirect common control with the issuer. All the liabilities of the issuer in such detail and such form as the Commission shall prescribe, including surplus of the issuer showing how and from what sources such surplus was created, all as of a date not more than ninety days prior to the filing of the registration statement. If such statement be not certified by an independent public or certified accountant, in addition to the balance sheet required to be submitted under this schedule, a similar detailed balance sheet of the assets and liabilities of the issuer, certified by an independent public or certified accountant, of a date not more than one year prior to the filing of the registration statement, shall be submitted;

(26) a profit and loss statement of the issuer showing earnings and income, the nature and source thereof, and the expenses and fixed charges in such detail and such form as the Commission shall prescribe for the latest fiscal year for which such statement is available and for the two preceding fiscal years, year by year, or, if such issuer has been in actual business for less than three years, then for such time as the issuer has been in actual business, year by year. If the date of the filing of the registration statement is more than six months after the close of the last fiscal year, a statement from such closing date to the latest practicable date. Such statement shall show what the practice of the issuer has been during the three years or lesser period as to the character of the charges, dividends or other distributions made against its various surplus accounts, and as to depreciation, depletion, and maintenance charges, in such detail and form as the Commission shall prescribe, and if stock dividends or avails from the sale of rights have been credited to income, they shall be shown separately with a statement of the basis upon which the credit is computed. Such statement shall also differentiate between any recurring and nonrecurring income and between any investment and operating income. Such statement shall be certified by an independent public or certified accountant;

(27) if the proceeds, or any part of the proceeds, of the security to be issued is to be applied directly or indirectly to the purchase of any business, a profit and loss statement of such business certified by an independent public or certified accountant, meeting the requirements of paragraph (26) of this schedule, for the three preceding fiscal years, together with a balance sheet, similarly certified, of such business, meeting the requirements of paragraph (25) of this schedule of a date not more than ninety days prior to the filing of the registration statement or at the date such business was acquired by the issuer if the business was acquired by the issuer more than ninety days prior to the filing of the registration statement;

(28) a copy of any agreement or agreements (or, if identic agreements are used, the forms thereof) made with any underwriter, in-

cluding all contracts and agreements referred to in paragraph (17) of this schedule;

(29) a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation of such opinion, when necessary, into the English language;

(30) a copy of all material contracts referred to in paragraph (24) of this schedule, but no disclosure shall be required of any portion of any such contract if the Commission determines that disclosure of such portion would impair the value of the contract and would not be necessary for the protection of the investors;

(31) unless previously filed and registered under the provisions of this title, and brought up to date, (a) a copy of its articles of incorporation, with all amendments thereof and of its existing by-laws or instruments corresponding thereto, whatever the name, if the issuer be a corporation; (b) copy of all instruments by which the trust is created or declared, if the issuer is a trust; (c) a copy of its articles of partnership or association and all other papers pertaining to its organization, if the issuer is a partnership, unincorporated association, joint-stock company, or any other form of organization; and

(32) a copy of the underlying agreements or indentures affecting any stock, bonds, or debentures offered or to be offered.

In case of certificates of deposit, voting trust certificates, collateral trust certificates, certificates of interest or shares in unincorporated investment trusts, equipment trust certificates, interim or other receipts for certificates, and like securities, the Commission shall establish rules and regulations requiring the submission of information of a like character applicable to such cases, together with such other information as it may deem appropriate and necessary regarding the character, financial or otherwise, of the actual issuer of the securities and/or the person performing the acts and assuming the duties of depositor or manager.

SCHEDULE B

(1) Name of borrowing government or subdivision thereof;

(2) specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(3) the amount of the funded debt and the estimated amount of the floating debt outstanding and to be created by the security to be offered, excluding intergovernmental debt, and a brief description of the date, maturity, character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(4) whether or not the issuer or its predecessor has, within a period of twenty years prior to the filing of the registration statement, defaulted on the principal or interest of any external security, excluding intergovernmental debt, and, if so, the date, amount, and

circumstances of such default, and the terms of the succeeding arrangement, if any;

(5) the receipts, classified by source, and the expenditures, classified by purpose, in such detail and form as the Commission shall prescribe for the latest fiscal year for which such information is available and the two preceding fiscal years, year by year;

(6) the names and addresses of the underwriters;

(7) the name and address of its authorized agent, if any, in the United States;

(8) the estimated net proceeds to be derived from the sale in the United States of the security to be offered;

(9) the price at which it is proposed that the security shall be offered in the United States to the public or the method by which such price is computed. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(10) all commissions paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which the underwriter is interested, made, in connection with the sale of such security. Where any such commission is paid, the amount of such commission paid to each underwriter shall be stated;

(11) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than the commissions specified in paragraph (10) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, and other charges;

(12) the names and addresses of counsel who have passed upon the legality of the issue;

(13) a copy of any agreement or agreements made with any underwriter governing the sale of the security within the United States; and

(14) an agreement of the issuer to furnish a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation, where necessary, into the English language. Such opinion shall set out in full all laws, decrees, ordinances, or other acts of Government under which the issue of such security has been authorized.

TITLE II

SECTION 201. For the purpose of protecting, conserving, and advancing the interests of the holders of foreign securities in default, there is hereby created a body corporate with the name "Corporation of Foreign Security Holders" (herein called the "Corporation"). The principal office of the Corporation shall be located in the District of Columbia, but there may be established agencies or branch offices in any city or cities of the United States under rules and regulations prescribed by the board of directors.

SEC. 202. The control and management of the Corporation shall be vested in a board of six directors, who shall be appointed and

hold office in the following manner: As soon as practicable after the date this Act takes effect the Federal Trade Commission (hereinafter in this title called "Commission") shall appoint six directors, and shall designate a chairman and a vice chairman from among their number. After the directors designated as chairman and vice chairman cease to be directors, their successors as chairman and vice chairman shall be elected by the board of directors itself. Of the directors first appointed, two shall continue in office for a term of two years, two for a term of four years, and two for a term of six years, from the date this Act takes effect, the term of each to be designated by the Commission at the time of appointment. Their successors shall be appointed by the Commission, each for a term of six years from the date of the expiration of the term for which his predecessor was appointed, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of such predecessor. No person shall be eligible to serve as a director who within the five years preceding has had any interest, direct or indirect, in any corporation, company, partnership, bank or association which has sold, or offered for sale any foreign securities. The office of a director shall be vacated if the board of directors shall at a meeting specially convened for that purpose by resolution passed by a majority of at least two thirds of the board of directors, remove such member from office, provided that the member whom it is proposed to remove shall have seven days' notice sent to him of such meeting and that he may be heard.

SEC. 203. The Corporation shall have power to adopt, alter, and use a corporate seal; to make contracts; to lease such real estate as may be necessary for the transaction of its business; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to require from trustees, financial agents, or dealers in foreign securities information relative to the original or present holders of foreign securities and such other information as may be required and to issue subpenas therefor; to take over the functions of any fiscal and paying agents of any foreign securities in default; to borrow money for the purposes of this title, and to pledge as collateral for such loans any securities deposited with the Corporation pursuant to this title; by and with the consent and approval of the Commission to select, employ, and fix the compensation of officers, directors, members of committees, employees, attorneys, and agents of the Corporation, without regard to the provisions of other laws applicable to the employment and compensation of officers or employees of the United States; to define their authority and duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and to prescribe, amend, and repeal, by its board of directors, bylaws, rules, and regulations governing the manner in which its general business may be conducted and the powers granted to it by law may be exercised and enjoyed, together with provisions for such committees and the functions thereof as the board of directors may deem necessary for facilitating its business under this title. The board of directors of the Corporation shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid.

SEC. 204. The board of directors may—

(1) Convene meetings of holders of foreign securities.

(2) Invite the deposit and undertake the custody of foreign securities which have defaulted in the payment either of principal or interest, and issue receipts or certificates in the place of securities so deposited.

(3) Appoint committees from the directors of the Corporation and/or all other persons to represent holders of any class or classes of foreign securities which have defaulted in the payment either of principal or interest and determine and regulate the functions of such committees. The chairman and vice chairman of the board of directors shall be ex officio chairman and vice chairman of each committee.

(4) Negotiate and carry out, or assist in negotiating and carrying out, arrangements for the resumption of payments due or in arrears in respect of any foreign securities in default or for rearranging the terms on which such securities may in future be held or for converting and exchanging the same for new securities or for any other object in relation thereto; and under this paragraph any plan or agreement made with respect to such securities shall be binding upon depositors, providing that the consent of holders resident in the United States of 60 per centum of the securities deposited with the Corporation shall be obtained.

(5) Undertake, superintend, or take part in the collection and application of funds derived from foreign securities which come into the possession of or under the control or management of the Corporation.

(6) Collect, preserve, publish, circulate, and render available in readily accessible form, when deemed essential or necessary, documents, statistics, reports, and information of all kinds in respect of foreign securities, including particularly records of foreign external securities in default and records of the progress made toward the payment of past-due obligations.

(7) Take such steps as it may deem expedient with the view of securing the adoption of clear and simple forms of foreign securities and just and sound principles in the conditions and terms thereof.

(8) Generally, act in the name and on behalf of the holders of foreign securities the care or representation of whose interests may be entrusted to the Corporation; conserve and protect the rights and interests of holders of foreign securities issued, sold, or owned in the United States; adopt measures for the protection, vindication, and preservation or reservation of the rights and interests of holders of foreign securities either on any default in or on breach or contemplated breach of the conditions on which such foreign securities may have been issued, or otherwise; obtain for such holders such legal and other assistance and advice as the board of directors may deem expedient; and do all such other things as are incident or conducive to the attainment of the above objects.

SEC. 205. The board of directors shall cause accounts to be kept of all matters relating to or connected with the transactions and business of the Corporation, and cause a general account and balance sheet of the Corporation to be made out in each year, and cause all accounts to be audited by one or more auditors who shall examine the same and report thereon to the board of directors.

SEC. 206. The Corporation shall make, print, and make public an annual report of its operations during each year, send a copy thereof, together with a copy of the account and balance sheet and auditor's report, to the Commission and to both Houses of Congress, and provide one copy of such report but not more than one on the application of any person and on receipt of a sum not exceeding $1: *Provided*, That the board of directors in its discretion may distribute copies gratuitously.

SEC. 207. The Corporation may in its discretion levy charges, assessed on a pro rata basis, on the holders of foreign securities deposited with it: *Provided*, That any charge levied at the time of depositing securities with the Corporation shall not exceed one fifth of 1 per centum of the face value of such securities: *Provided further*, That any additional charges shall bear a close relationship to the cost of operations and negotiations including those enumerated in sections 203 and 204 and shall not exceed 1 per centum of the face value of such securities.

SEC. 208. The Corporation may receive subscriptions from any person, foundation with a public purpose, or agency of the United States Government, and such subscriptions may, in the discretion of the board of directors, be treated as loans repayable when and as the board of directors shall determine.

SEC. 209. The Reconstruction Finance Corporation is hereby authorized to loan out of its funds not to exceed $75,000 for the use of the Corporation.

SEC. 210. Notwithstanding the foregoing provisions of this title, it shall be unlawful for, and nothing in this title shall be taken or construed as permitting or authorizing, the Corporation in this title created, or any committee of said Corporation, or any person or persons acting for or representing or purporting to represent it—

(a) to claim or assert or pretend to be acting for or to represent the Department of State or the United States Government;

(b) to make any statements or representations of any kind to any foreign government or its officials or the officials of any political subdivision of any foreign government that said Corporation or any committee thereof or any individual or individuals connected therewith were speaking or acting for the said Department of State or the United States Government; or

(c) to do any act directly or indirectly which would interfere with or obstruct or hinder or which might be calculated to obstruct, hinder or interfere with the policy or policies of the said Department of State or the Government of the United States or any pending or contemplated diplomatic negotiations, arrangements, business or exchanges between the Government of the United States or said Department of State and any foreign government or any political subdivision thereof.

SEC. 211. This title shall not take effect until the President finds that its taking effect is in the public interest and by proclamation so declares.

SEC. 212. This title may be cited as the "Corporation of Foreign Bondholders Act, 1933."

Approved May 27th 1933.

APPENDIX C.

Document Withdrawing Registration Statement Presented to Securities and Exchange Commission on June 18, 1935.

Mr. Chairman, Representative of the Honorable Commission:—

I caused to be filed with your honorable selves, under date of 4 May, 1935, an application for the registration of Participation Trust Certificates of the J. Edward Jones Royalty Trust, Series "M." I filed this application in genuine purpose directed toward cooperation with the Commission in its commendable endeavors to secure registrations of important offerings of Securities to the public. I did this, although I previously had understood that the J. Edward Jones Royalty Trust had earned exemptions established by rules and regulations promulgated by the Commission and that therefore registration of the Trust was not required.

In the preparation of the statement which was filed, I procured the valued services of an honorable member of the Bar, one of eminent standing and esteem among a substantial profession and in a noted community, the honorable E. J. Lundy, of Oklahoma. Judge Lundy wrote the Indenture Creating the Trust, prepared all the statements made in the registration papers in question, consulted with me after their preparation and advised me that they conformed, in general plan, to the Indentures which have created previous series of the J. Edward Jones Royalty Trust. I approved Judge Lundy's work and executed the documents.

Preliminary to these preparations, I had visited your officers here, seeking *a modus operandi* for the registration of my trust. In conference, I was advised, in the presence of the esteemed Chairman here, Mr. Green, that you had no forms applicable to the registration of a Trust similar to mine but that I could employ your regular Investment Trust forms (some of which then were handed to me for that purpose) and that I should fill out those forms as best I could,

whereupon they would be accepted and, if after study any additional information or data were required by you, I would be given opportunity to supply the deficiencies. I was advised that we could "sit down and work it out."

Although I believe the Commission does, in fact, notify registrants of deficiencies in filings within ten or twelve days after filing has been made, and in view of the conference I had had I expected to be notified before the expiration of the 20 day period allowed by law, I was surprised to receive *my* notification by telegram after business hours on the nineteenth day, the telegram being dated at 5:35 P.M. of that day.

Instead of being allowed an opportunity, as others have enjoyed, to "sit down and work it out" with you, *my* notification advised me of "untrue statements of material facts" and of omissions of "material facts necessary to make the statements therein not misleading," and peremptorily set a date at which I might appear before you in formal hearing to "show cause why a stop order should not be issued suspending the effectiveness" of my registration statement.

I immediately communicated with Judge Lundy, whereupon close study was made of copies of the registration papers and to this day neither of us can discern, by any possible stretch of intelligent imagination, any untrue or misleading statement contained therein. Nevertheless, you have seen fit to issue a press release giving widespread publicity to such references as "untrue" and "misleading" statements which, to my mind, places me severely at damage, in that my Government is, by such release, in effect notifying the public and, of course, my own clientele, that J. Edward Jones is likely to have a "stop order" placed against his Trust.

I believe such practice is subversive of honorable intentions in business, damaging to constructive purpose, undermining of the confidence of business men in Governmental attempts at business regulation, and not capable of serving J. Edward Jones well in the circumstances.

I, therefore, with regret and with distressful feelings, but with respect toward you, now formally withdraw my application for registration of the Participation Trust Certificates of the J. Edward Jones Royalty Trust, Series "M." I do this because of my fear that the business which I founded fifteen years ago and to which I have dedicated the whole of my business career, will be made the object of continual sabotage.

J. EDWARD JONES.

Washington, D. C.
June 18, 1935—

APPENDIX D.

In the Matter of the Registration Statement of J. Edward Jones, File No. 2-1408-1.

Excerpts From Minutes of Proceedings Before Securities and Exchange Commission at Washington, D. C.

PROCEEDINGS OF JUNE 18, 1935.

Examiner Green: Pursuant to the provisions of the Securities Act of 1933, and under an order of the Commission dated May 25, 1935, supplemented by order dated June 5, 1935, the matter of the registration statement of J. Edward Jones, file No. 2-1408-1, now comes on for hearing.

The hearing was originally set for June 6th, and continued until this date on application of the registrant.

Counsel for the registrant and counsel for the Commission will please enter their appearances. Is the registrant present by counsel?

Mr. Fischbach: Yes, sir. I appear for the registrant.

Examiner Green: Is the Commission ready to proceed?

Mr. Cahn: The Commission is ready.

Examiner Green: Is the registrant ready?

Mr. Fischbach: Yes, sir.

Examiner Green: Call your witnesses.

* * *

Mr. Fischbach: I have a statement here from J. Edward Jones, that I should like to read into the record because this proceeding will be very much affected by it.

Mr. Brookhart: Mr. Examiner, the Commission has issued a subpoena for Mr. Jones' appearance at this hearing. I believe counsel has agreed to stipulate that Mr. Jones did receive the subpoena or that it was left on his desk.

Mr. Fischbach: It is so stipulated.

Examiner Green: Is Mr. Jones here?

Mr. Fischbach: He is not in the court room.

Examiner Green: He is in Washington?

Mr. Fischbach: He is.

Examiner Green: Why is he not here in answer to this subpoena?

Mr. Fischbach: This statement will answer that question.

Mr. Burns: I object to reading into the record a statement by Mr. Jones. The Commission has already had a very unhappy experience with Mr. Jones' method of trying cases in the newspapers, and I suspect very strongly this is just another device of his, and I suggest prior to any reading into the record of any statement by Mr. Jones, that you look upon it and consider it from the point of view of its relevancy.

Examiner Green: I think it is important to see the statement, to see whether or not it is material to this inquiry. Of course, this inquiry is directed to the registration statement.

Mr. Fischbach: I think you will find this statement is material to these proceedings. (The counsel here hands paper to the Examiner.)

Examiner Green: (After looking at statement.) Do

you want to insist upon the application to withdraw the registration statement?

Mr. Fischbach: Yes, sir.

Examiner Green: What does the Commission have to say to that?

Mr. Burns: May we have a few minutes to confer?

Examiner Green: Yes.

(After a short interval.)

Examiner Green: Has the Commission decided what they want to do with reference to this application for withdrawal?

Mr. Burns: The Commission, after considering this problem, has determined that on this application they would not exercise the discretion to permit a withdrawal of the registration statement, and would like to state for the record that despite the statement made in the petition of the registrant, that the procedure of not permitting the registration statement to be withdrawn is not unusual, and is in conformity with the established practice of the Commission. *To refuse to permit a registrant to go right up to the guns of a stop order proceedings* and then seek to avoid it without establishing any sound basis for such avoidance.

Mr. Fischbach: Before any comment can be properly made on the record as to the soundness of the position taken by the registrant I think the statement ought to be in the record, and I ask permission of the Examiner to read it into the record.

* * *

Mr. Fischbach: May I offer this in evidence?

* * *

Mr. Burns: I suggest it be marked for identification for the purposes of the record, and be excluded from being introduced in evidence.

* * *

Examiner Green: Let me state this here: This hearing is to determine whether or not the Commission shall issue an order under Section 8(d) of the Securities Act of 1933.

Only those matters which are material to that particular inquiry are competent, and this certainly is not. For that reason I am going to exclude it. Have it marked for identification, and you may take an exception to the ruling, if you wish, but I will not permit it to be read into the record.

Mr. Fischbach: Well, I am entirely governed by the ruling, but I except to it, of course.

* * *

Examiner Green: It will be marked for identification as Registrant's Exhibit No. 1.

(The document referred to was marked "Registrant Exhibit No. 1," Fischbach, Counsel for identification only.)

Examiner Green: I want to say again, Mr. Fischbach, that you have an opportunity to bring Mr. Jones here and you have a right to question him on anything that is material to this inquiry.

Mr. Fischbach: I understand.

Examiner Green: And I will gladly hear it.

Mr. Fischbach: I understand, your honor.

Mr. Cahn: Mr. Examiner——

Mr. Fischbach: Before proceeding will you indulge me for just a few moments time, please?

Mr. Cahn: Yes.

Mr. Fischbach: As counsel for J. Edward Jones, the registrant, I wish to note on the record the formal withdrawing by the registrant of——

Examiner Green: You mean request for withdrawal, do you not?

Mr. Fischbach: Well, I mean, Mr. Examiner, exactly what I said.

Examiner Green: You recognize, of course, that you have no power or authority to withdraw a registration statement without the consent of the Commission.

Mr. Fischbach: Our minds do not meet on the subject, Mr. Examiner, and I wish to note on the record the formal withdrawal by the registrant of the registration statement as signed by the registrant and filed under date

of the 4th of May, 1935, with the Securities and Exchange Commission, identified with this proceeding as file No. 2-1408, and I wish to state with respect to the withdrawal of such registration statement that there is no proceeding before the Examiner.

Examiner Green: With regard to the application of the registrant to withdraw his registration statement, I direct his attention to rule 47 of the Commission which provides, among other things:

> "Any registration statement or amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto."

In view of the rule and regulation of the Commission, and the action of the Commission heretofore taken on your application for withdrawal, I will not permit a withdrawal, and we will proceed.

Mr. Fischbach: May it be noted of record that further proceedings to be had based on the registration statement, it is not my intention nor the intention of my associate, Mr. Toomey, to participate in any of the proceedings and that we wish the record to show formally that although we may be present at some part of the proceeding, that our presence is that of spectators.

Examiner Green: Has the Commission anything to say?

Mr. Burns: In view of the ruling of the Examiner I think comment is unnecessary.

Examiner Green: Very well. The record will show that Mr. Jones is not now appearing by counsel.

APPENDIX E.

Excerpts From Minutes of Proceedings of June 27th, 1935, J. Edward Jones Matter, File No. 2-1408-1.

Examiner Green: Is the Commission ready to proceed in this matter?

Mr. Cahn: We are.

Examiner Green: All right, let the hearing be convened.

Is there any additional testimony to be offered?

Mr. Cahn: I would like to have Mr. J. Edward Jones called as my next witness.

Mr. Fischback: Mr. J. Edward Jones is not here and has no intention of honoring the subpoena served upon him in New York, under date of June 18, 1935, and the basis for his refusing to honor that subpoena is contained in the papers which we now offer for your inspection.

Mr. Cahn: Mr. Examiner, I offer this document in the record.

Examiner Green: Mr. Fischback, is the subpoena here; together with the Marshal's certification?

Mr. Fischback: Yes, we do not deny that the subpoena was properly served.

Examiner Green: This document will be received in evidence as Commission's Exhibit No. 8.

* * *

Mr. Fischback: May the record show that both Mr. Glasser and I are appearing specially and merely for the purpose of presenting to the Commission the various papers that have been tendered to the Commission, at 10:20 o'clock this morning, upon which you have conferred with members of the Commission?

Examiner Green: As I understand it, you gentlemen are appearing as counsel for Mr. Jones personally, and not as counsel for Mr. Jones as Registrant?

Mr. Fischbach: That is correct.

Examiner Green: However, Registrant is not in any way contesting this proceeding, is he?

Mr. Fischbach: Well, we are not contesting the proceeding on its merits but we contend as counsel for Mr. Jones, that there is no proceeding lawfully pending before the Commission, and we raise the same contention that I raised on the 18th of June, before this Honorable body, that upon the withdrawal of the Registration Statement identified with the proceedings which the Commission appeared to be taking, that the withdrawal of such Registration Statement has completely terminated the power of the Commission in that connection.

Examiner Green: The Examiner has ruled upon that question, and my ruling is the same now, as before.

Is there anything else?

Mr. Fischbach: Yes, I should like to have your permission to offer the originals of the papers which were tendered to counsel for the Commission.

Examiner Green: I understand that they are motions made in the proceedings?

Mr. Fischbach: Yes.

Mr. Cahn: Mr. Examiner, I do not believe that the procedure which Mr. Fischbach offers is proper in this case. The Commission has provided rules for the submission of papers of that sort, and I think that counsel for Mr. Jones should follow those rules and give the Commission an opportunity to examine those papers.

Mr. Fischbach: I understood that the purpose of the recess of over half an hour was to give the Commission and Commission members an opportunity to examine the papers and confer about them.

Mr. Cahn: That may be, but, nevertheless, I do not believe it was proper to submit papers in a hearing of this kind in that manner.

Mr. Fischbach: Do I understand that your objection is that the Commission has not had an opportunity to examine them?

Mr. Cahn: My objection is that those papers were not offered in the proper manner.

Examiner Green: What rule do you refer to, Mr. Cahn?

Mr. Cahn: I refer to Release 47.

Examiner Green: Will you show me that, please?

Mr. Cahn: Yes—I will have one here in just a minute, Mr. Examiner.

(At this point Mr. Cahn advanced to the bench and commenced to whisper in the Examiner's ear.)

Mr. Fischbach: I would like to know, Mr. Examiner, whether Mr. Cahn is now addressing you on any matter concerning this proceeding, and, if he is, I believe it should be on the record.

• • •

(With which statement of registrant's counsel the Examiner agreed.)

Note—The Reporters failed to indicate the occasion of Mr. Fischbach's statement and the record is corrected accordingly.

• • •

Examiner Green: The practical effect of these motions is to dismiss the proceedings. I think that counsel has the right to make such motions. I think the form may be considered and passed upon, and they may be allowed or overruled.

• • •

Mr. Fischbach: I present to your Honor the motion for the dismissal of the Registration Statement and proceedings of J. Edward Jones, in this proceeding, identified as File 2-1408.

Examiner Green: That motion will be overruled.

Mr. Fischbach: Exception, please.

Examiner Green: I might state that the basis for my ruling on that motion is the same as in the case of your former motion to withdraw the statement.

Mr. Fischbach: Now, I present to your Honor a mo-

tion to dismiss this proceeding, subscribed and sworn to by J. Edward Jones, on June 26, 1935, in which motion we ask that this Commission—

Examiner Green (Interposing): There is no need to read or state the substance of that; I have the motion before me. Let the record show that it is overruled, for the same reason.

Mr. Fischback: Exception.

I now present to your honor a motion to quash the subpoena issued by your Honor as an officer of the Commission, on the 18th of June, 1935.

Examiner Green: I have the motion before me. Let the record show that it is overruled.

Mr. Fischbach: Exception.

I now present a written statement of the objection to the jurisdiction of this Commission and a motion in regard to the jurisdiction of this Commission to entertain this proceeding.

Mr. Cahn: Just a minute. Let me examine that one again, please?

Mr. Fischbach: Yes. (Handing document to counsel for the Commission.)

Mr. Cahn: Is this filed by J. Edward Jones?

Mr. Fischbach: Yes, filed by J. Edward Jones and his counsel, as indicated.

Mr. Cahn: I think I will object to this statement, Mr. Examiner, on the ground that it is not properly qualified. This is apparently an effort to get into the record a statement by Mr. J. Edward Jones, and, as such, is hearsay, inasmuch as Mr. J. Edward Jones is not here and not subject to cross examination as to the facts in this statement.

Examiner Green: Let me see that statement, please?

Mr. Cahn: Yes, sir. (Handing document to the Examiner.)

Examiner Green: What particular section of this do you refer to, Mr. Cahn?

Mr. Cahn: I refer particularly to Section E.

Examiner Green: Is that a question of fact or a question of law?

Mr. Cahn: I think it is a question of fact and this (indicated part of the document) is really a mixed question of law and of fact, I think, Mr. Examiner.

Mr. Fischbach: I think that that is a proper allegation of an ultimate fact, sufficiently pleaded, your Honor, without any evidence to support the statement.

Examiner Green: The question that is worrying me is that it may be a self-serving declaration on the part of J. Edward Jones, and he is not here to be cross-examined as to the statements. Of course, Mr. Jones cannot come in here and make some statement of fact without permitting himself to be subjected to cross examination.

Mr. Glasser: Of course, he challenges the jurisdiction of the court in its entirety, and it is not a question of fact, but a question of law.

Examiner Green: I understand that, but, in this motion, I understand that Mr. Jones states that he is not engaged in interstate commerce.

Mr. Glasser: That is the question of law. The Registration Statement which is before your Honor recites the circumstances under which he is doing business. Now, on the Registration Statement, we say that he is not under the jurisdiction of this Commission.

Mr. Cahn: I do not think that counsel can point to any part of the law which supports his statement as to the business.

Mr. Glasser: The statement points out the way of his doing business.

Mr. Cahn: The mere fact that he filed his Registration Statement shows that he thought at one time that he was engaged in interstate commerce.

Mr. Glasser: Whatever he thought at that time, he now has the right to challenge the jurisdiction of this Com-

mission, as a question of law, and we are merely proceeding to challenge the legal question.

* * *

Examiner Green: We can say that this motion is in the nature of a pleading, although I think it contains an allegation of fact. May the motion not be received, and may not the question of whether there is any statement of fact, or not, therein, be considered in determining whether or not the motion should be overruled?

* * *

Mr. Glasser: I merely want to make the further observation, Mr. Examiner, that subsection G, in substance, states that the sale of units of securities, without ownership in New York, or any other State, of oil production in Oklahoma, is not interstate business. The courts will take judicial notice of the fact that there is not any oil being produced in New York or Connecticut, and we say here that the sale of units of securities in New York, of production in Oklahoma, is not an interstate business.

Mr. Flynn: This is purely a statement of fact, unsupported by Mr. Jones, and I suppose it could go in for what it is worth, but the statement also states that the business of J. Edward Jones is in the selling of units of securities in New York and Oklahoma, and if the units are not such units of oil production in New York and Oklahoma, but, rather, trust certificates of a trust which, in turn, owns ownership of oil——

Examiner Green: (Interposing.) Is not that a fact which should be shown by evidence?

Mr. Glasser: Yes.

Examiner Green: No pleading of that is here. I think the statement may be received, but I think it should be overruled, because it contains allegations of fact and no evidence is offered to support them.

Mr. Glasser: May I have an exception?

Examiner Green: Yes.

Mr. Glasser: Would the Examiner object to the addition of the words "overruled and denied?"

Examiner Green: Overruled and denied.

Mr. Flynn: Mr. Examiner, am I to understand that, in that ruling, you are making any statement that Mr. Jones is not engaged in that type of business?

Examiner Green: Oh no, that will have to be sustained by the record.

Mr. Flynn: And the ruling implies no assertion by the Commission of any jurisdiction for registration purposes over any individual engaged purely in an intrastate business; is that correct?

Examiner Green: The motion was received simply for the reason that the Examiner is of the opinion that the counsel for Registrant has no right to dismiss the proceeding. I understand that the motion speaks for itself, but I think we have to consider the evidence as much as the motion.

Mr. Fischbach: May I call upon counsel for the Commission to indicate whether they would like to have further copies of the motion presented?

Mr. Cahn: I believe we have sufficient copies.

Counsel, of course, understands, Mr. Examiner, that the rulings here made are rulings which can be argued before the Commission?

Mr. Glasser: Yes.

Examiner Green: Let the record show that counsel for the Commission accepts my act.

Mr. Glasser: Let the record show that we waive any argument to the Commission.

Examiner Green: Is there anything else to be offered?

Mr. Fischbach: We should like to withdraw, without any indication——.

Mr. Cahn: Mr. Examiner, in view of the fact that Mr. Jones has not appeared, I request an adjournment until such time as the Commission may, by proceedings to be instituted, compel the appearance of Mr. Jones in this hearing being held before the Commission.

Mr. Glasser: To which request Mr. Jones enters his

objection, on the ground that the Commission is without authority to make any such request.

Mr. Cahn: The adjournment is asked for because of the failure of the Registrant to present his appearance and the Commission expects to use its power, under the Act, in a proper court, to compel the appearance of Mr. Jones.

Mr. Glasser: We have no objection to that, but we think that the Commission's hearing should be adjourned without such statements being made.

Examiner Green: You are asking for a continuance, I understand?

Mr. Cahn: Yes.

Examiner Green: In the event that the Commission does undertake some steps to compel Mr. Jones' appearance, the record will have to be held open until that time. I want the record to show that Mr. Jones was duly served with subpoena to appear and to testify in these proceedings and that he has failed to cooperate with the Commission and appear, and has refused to be examined in connection with the Registration Statement filed by him.

Do you suggest any time for the continued hearing?

Mr. Cahn: No, I have no suggestion, Mr. Examiner. We are going to proceed in the matter as promptly as possible.

Examiner Green: Let the hearing be continued indefinitely, with the understanding that counsel for Registrant will be notified in advance of any hearing.

Mr. Glasser: We desire to say that we intend to take some action in court, and we will be courteous enough to give counsel for the Commission notice of any action on our part.

Examiner Green: I mean that a continuance of this proceeding, the date of such continuance, shall be given to the Registrant and his counsel.

Let the record show that the Examiner has requested counsel for the Commission to submit a brief of their intentions with respect to this situation.

Mr. Cahn: Yes, sir.

Examiner Green: And that may be submitted within ten days. Copy of it will not be submitted to the Registrant, because he has not appeared here.

(Thereupon, at 11:30 o'clock a.m., the hearing in the above-entitled cause was accordingly adjourned indefinitely.)

APPENDIX F.

Assignment of Errors.

1. The Court erred in ruling that there was any proceeding pending before the Securities and Exchange Commission to which an order to appear and testify could attach.

2. The Court erred in ruling that there was any proceeding pending before the Securities and Exchange Commission on the 18th day of June, 1935, out of or in aid of which the Commission was empowered to issue a subpoena.

3. The Court erred in ruling that there was a proceeding pending before the Securities and Exchange Commission in aid of which it could entertain an application under the provisions of Section 22-b of the Securities Act of 1933 as amended.

4. The Court erred in ruling that the registration statement of J. Edward Jones had become effective on May 24, 1935.

5. The Court erred in ruling that the registration statement of the respondent now continues to be effective.

6. The Court erred in ruling that the withdrawal of said registration statement which occurred on June 18, 1935, did not terminate the proceedings then pending before the Securities and Exchange Commission.

7. The Court erred in ruling that the subpoena issued on the 18th day of June, 1935, had any legal force or efficacy.

8. The Court erred in ruling that under the provisions of Section 8 of the Securities Act of 1933, as amended, the Securities and Exchange Commission was empowered to have the respondent attend before it as a witness.

9. The Court erred in ruling that under the provisions of Section 8 of the Securities Act of 1933, as amended, the Commission's powers in the premises extended beyond affording an opportunity for hearing.

10. The Court erred in refusing to rule that under the provisions of the Securities Act of 1933, as amended, it is entirely optional with a registrant to determine whether he should take advantage of the opportunity for hearing therein prescribed or, at his discretion, submit to a stop order without a hearing.

11. The Court erred in ruling that the sufficiency of the petition of the applicant should not be determined by the same standards and requirements applicable to all other pleadings in the District Court.

12. The Court erred in ruling that it had jurisdiction to entertain the application under the provisions of Section 22-b of the Securities Act of 1933, as amended, in the face of the pending petition for review in the Circuit Court of Appeals of the Second Circuit.

13. The Court erred in ruling that it had jurisdiction to entertain the application lodged before it in view of the pendency in the Circuit Court of Appeals for the Second Circuit of a petition to review the identical questions.

14. The Court erred in ruling that the institution of proceedings in the Circuit Court of Appeals for the Sec-

ond Circuit, pursuant to the provisions of Section 9-a of the Securities Act as amended, did not divest the District Court of jurisdiction to hear and determine the identical questions.

15. That in interpreting the questions raised concerning the validity and constitutionality of certain provisions of the Securities Act of 1933, the Court erred in ruling that such act should be construed so as to bring the enactment thereof within the powers of Congress.

16. The Court erred in ruling that all doubts as to the constitutionality of the Securities Act of 1933, as amended, by which act the civil and criminal liability of citizens was drastically enlarged, must be resolved in favor of constitutionality.

17. The Court erred in ruling that Congress, in the exercise of that power conferred upon it by Section 8, Clauses 3, 7 and 18 of the Constitution of the United States, had the authority to enact Section 5 of the Securities Act of 1933, as amended.

18. The Court erred in ruling that the enactment of the Securities Act of 1933 was a proper legislative function of Congress and a proper exercise of the powers granted it under the Constitution.

19. The Court erred in refusing to rule that the Securities and Exchange Commission had no legal existence and was not lawfully created.

20. The Court erred in refusing to rule that the process of the Securities and Exchange Commission was void and without legal efficacy.

21. The Court erred in refusing to rule that the Securities Act of 1933 as amended was unconstitutional and void by reason of being violative of and repugnant to pro-

visions of the 4th, 5th, 9th, 10th and 14th amendments to the Constitution of the United States.

22. The Court erred in refusing to rule that the Securities Act of 1933 was void as an attempted delegation of legislative power to the Securities and Exchange Commission and therefore violative of and repugnant to the provisions of the 4th, 5th and 9th amendments to the Constitution of the United States.

23. The Court erred in refusing to rule that the Securities Act of 1933 as amended is unconstitutional and void by reason of such legislation being an attempt to usurp powers reserved to the respective states and the people thereof by the 10th amendment to the Constitution of the United States.

24. The Court erred in refusing to rule that the activities of the respondent in the sale in New York and elsewhere of units of ownership in oil production in the State of Oklahoma are not subject to regulation by the Federal Government.

25. The Court erred in refusing to rule that the business of the respondent is not a business involving a public offering of securities in interstate commerce within the regulatory control of the Federal Government.

26. The Court erred in ruling that the Securities and Exchange Commission had power to enact, "release" or "rule" 47 and erred in failing to rule that such power, if vested in the Commission by the terms of the Act is void as a prohibited delegation of legislative powers.

27. The Court erred in ruling that Rule 47 was validly enacted.

28. The Court erred in ruling that the Securities and

Exchange Commission had acted validly under the provisions of Rule 47.

29. The Court erred in ruling that the Securities and Exchange Commission had the authority under the provisions of Rule 47 to refuse the respondent the right to withdraw a registration statement previously filed by him.

30. The Court erred in failing to rule that Rule 47 had no force or legal effect by reason of it having been adopted contrary to and in violation of the provisions of Section 19-a of the Securities Act of 1933 as amended.

31. The Court erred in refusing to rule that the action of the Securities and Exchange Commission under and pursuant to the provisions of Rule 47 in denying the respondent the right to withdraw a registration statement previously filed by him was arbitrary and void and violative of the plain language of said rule.

32. The Court erred in refusing to rule that the denial by said Securities and Exchange Commission of the respondent's right to withdraw the registration statement previously filed by him was void by reason of being discriminatory as well as arbitrary.

33. The Court erred in ruling that it was within the power of Congress to delegate to an administrative tribunal the power to enact regulations having the force of law and subjecting persons guilty of a violation of such regulations to penal fine, imprisonment and penal servitude.

34. The Court erred in ruling that the right of the respondent to withdraw the registration statement previously filed by him was not absolute in the absence of a showing on the record that the public interest and the protection of investors otherwise required.

35. The Court erred in refusing to rule that the pro-

ceedings of the Securities and Exchange Commission conducted by one of its attorneys did not deprive the respondent of due process of law.

36. The Court erred in refusing to rule that proceedings of the Securities and Exchange Commission conducted by one of its attorneys were illegal and improper by reason thereof.

37. The Court erred in refusing to rule that the proceedings of the Securities and Exchange Commission subsequent to June 18, 1935, were illegal and improper by reason of the withdrawal of the registration statement on said date.

38. The Court erred in ruling that the Securities and Exchange Commission had jurisdiction over the subject matter of the business of the respondent.

39. The Court erred in refusing to rule that oil royalties and interests in oil and gas production are interests in realty and not securities.

40. The Court erred in ruling that oil royalties and interests in oil and gas production are securities subject to regulation by the Federal Government.

41. The Court erred in refusing to rule that the definition of the term "security", as including oil royalties or fractional undivided interests in oil, gas or other mineral rights contained in Section 2, subdivision 1 of the Securities Act of 1933 as amended, is contrary to the positive law of oil producing states and therefore beyond the power of Congress to so declare.

42. The Court erred in failing to rule that the Securities and Exchange Commission had an adequate statutory remedy at law by reason of being able in the state of the

record before it to enter a stop order, the existence of which remedy precluded the intervention of equity.

43. The Court erred in refusing to rule that the course of conduct being pursued by the Securities and Exchange Commission in the cause at bar was contrary to the standards stated by Mr. Justice HOLMES in

Federal Trade Commission v. *American Tobacco Co.*, 264 U. S. 298.

44. The Court erred in ruling that the objections of the respondent to the course of action being pursued by the Securities and Exchange Commission were premature.

45. The Court erred in granting the applicant's motion and in entering its order accordingly.

—

The petitioner will rely upon the following numbered of the above-quoted assignments of errors, to-wit: 1, 2, 3, 4, 7, 8, 9, 10, 11, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44 and 45.

APPENDIX G.

Release No. 5 of the Securities and Exchange Commission.

FOR IMMEDIATE RELEASE, Thursday July 6, 1933.

Securities Act of 1933

Release No. 5

The Federal Trade Commission today approved the rules, regulations and form for administration of the Securities Act of 1933, copies of which are available upon application.

In approving the rules the Commission had regard for the public interest and for the protection of investors, but endeavored to place no undue burden either upon general business or upon honest and reputable investment dealers.

The act prohibits the filing of a statement prior to July 7 and requires that it be on file at least twenty days before a security may be sold under the act. Realizing that many issuing companies distantly situated from Washington have been unable to obtain forms and prepare the statements required on July 7, the Commission promulgated a rule providing that such companies might file in such form as they might reasonably consider to be in compliance with the act, "provided that an amendment to such registration statement shall be filed at least ten days prior to the effective date, in the required form prescribed by the Commission and shall contain full, accurate and complete information in respect of each item thereof."

Registration statements as received, with all information contained therein, will be available for public inspection at the Commission's offices in Washington. Photostatic or typewritten copies will be furnished at a nominal sum per page.

Registration statements and all other papers required therewith are to be filed in triplicate, the date on which they are actually received to be the date of the filing thereof.

The maximum aggregate price at which securities are proposed to be offered is to be stated, and payment is to be made of registration fee of one one-hundredeth of one per centum based upon such price, the fee not to be less than $25.

Five copies of the form of advertising prospectus proposed to be issued with reference to a security shall be filed along with the registration statement. The Commission is to be notified of the price and date to be inserted in the prospectus prior to the date of the public offering.

RADIO BROADCASTS MUST BE SUBMITTED IN WRITING IN ADVANCE.

Where a prospectus consists of a radio broadcast it shall be reduced to writing, five copies of which shall be filed with the Commission at least five days before the matter is to be broadcast or otherwise issued to the public.

There shall be inserted in a conspicuous part of advertising prospectuses, a statement the language of which is prescribed by the Commission, showing that "neither the fact that such registration has been filed with the Commission, nor the issuance of this prospectus under the rules or regulations prescribed, shall be deemed a finding by the Commission that this prospectus is true and accurate on its face, or omits to state a material fact or to mean that the Commission has in any way passed upon the merits of, or given approval to, such prospectus or the security mentioned therein."

RULES AND REGULATIONS APPLY ONLY TO TITLE I OF THE ACT.

The rules and regulations as approved today apply only to Title I of the act which provides for regulation of securities, particularly the registration thereof. No reference is made to Title II, the "Corporation of Foreign Bondholders Act, 1933," which is not to take effect until the President finds "that its taking effect is in the public interest and by proclamation so declares." The effective date is July 27.

The Commission desires to point out that most of the rules and regulations are explicitly required by the Securities Act. In some matters the Commission has discretion, and the rules and regulations in relation thereto are experimental pending actual working experience with the new Securities Act, and will be subject to revision from time to time as experience proves the advisability of changes.

APPENDIX H.

Release No. 47 of the Securities and Exchange Commission.

FOR IMMEDIATE RELEASE Friday,
September 22, 1933.

FEDERAL TRADE COMMISSION
Washington

SECURITIES ACT OF 1933
Release No. 47

The Federal Trade Commission announces adoption of a rule under the Securities Act conferring certain powers upon the person who is designated in each registration statement as authorized to receive all communications from the Commission concerning the security issue filed for registration.

According to the new ruling, such person shall have power to amend the registration statement by altering to a subsequent date the date of the proposed offering of the securities registered; power to withdraw the registration statement or amendments thereto; and power to consent to entry of an order by the Commission prior to effective date of the registration refusing to permit the registration statement to become effective until it has been amended in accordance with the order.

A consent order entered by the Commission under this ruling is to be "Without prejudice to the right of the registrant thereafter to have such order vacated upon a showing to the Commission that the registration statement as amended is no longer incomplete or inaccurate * * *."

Accompanying the rule is an explanatory note covering the arbitrary delaying of the proposed date of offering of a security in instances where the registration statement is incomplete or inaccurate but "can be corrected with ease by an amendment." The purpose is to permit of a method whereby an extension of 20 days can be afforded a registrant so as to allow him, without threat of stop order proceedings,

time to make and file the necessary amendments. The procedure is designed with the idea of permitting the Commission not to make a record against a registrant who, the Commission has reason to believe, is ready to conform to the act. Under this procedure the Commission can afford him sufficient time to make his registration statement conform to the act, at the same time preventing him from selling securities until the necessary amendments shall have been made.

Other rules adopted by the Commission pertain to *(1)* the withdrawal of a registration statement or an amendment thereto, *(2)* amendments filed pursuant to an order of the Commission, *(3)* a definition of "distribution" as used in Section 2 (11) of the act, and *(4)* the incorporation by reference of exhibits filed with previous registration statements. The purpose of the last named rule is merely to facilitate the second and subsequent registrations, and to avoid a filing of unnecessary exhibits with such registrations.

Full text of the new rules is as follows:

AMENDMENTS FILED PURSUANT TO AN ORDER OF THE COMMISSION.

An amendment made prior to the effective date of the registration statement shall be deemed to have been made pursuant to an order of the Commission within the meaning of Section 8(a) of the Securities Act so as to be treated as part of the registration statement only when the Commission shall after the filing of such amendment find that it has been filed pursuant to its order.

WITHDRAWAL OF REGISTRATION STATEMENT OR AMENDMENT THERETO.

Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. The fee paid upon the filing of such registration statement shall not be returned to the registrant. The papers comprising the registration

statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with date of the giving of such consent in the following manner: "Withdrawn upon the Request of the Registrant, the Commission consenting thereto." Such consent shall be given by the Commission with due regard to the public interest and the protection of investors.

CONFERRING OF POWERS OF AMENDMENT, WITHDRAWAL AND ENTRY OF CONSENT ORDER.

(1) All registrants shall hereafter confer upon the person designated in the registration statement as the person authorized to receive service and notice of all notices, orders, communications and other documents which may be issued by the Commission in connection with the registration statement,

(a) a power to amend the registration statement by altering to a subsequent date of the proposed offering of the securities for which the registration statement is filed; and

(b) a power to withdraw the registration statement or all amendments thereto, or an amendment made by virtue of the power conferred in paragraph (a) above; and

(c) a power to consent to the entry of an order issued under Section 8(b) of the Securities Act, waiving notice and hearing, such order being entered without prejudice to the right of the registrant thereafter to have such order vacated upon a showing to the Commission that the registration statement as amended is no longer incomplete or inaccurate on its face in any material respect.

(2) The naming of a person in accordance with the forms promulgated by the Commission as a person authorized to receive service and notice of all notices, orders, communications and other documents which may be issued by the Commission in connection with the registration state-

ment, shall be deemed also, unless there is an express statement to the contrary, as an authorization by the registrant of the person so named as having the powers specified in paragraph (1) of this rule.

EXPLANATORY NOTES. The Commission upon finding that a registration statement is on its face incomplete or inaccurate or includes an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading, but also finding that such incompleteness, inaccuracy, untruth or omission can be corrected with ease by an amendment, and recognizing that the case is not one that requires immediate steps to be taken to issue an order under Section 8(b) or 8(d) of the Securities Act, but recognizing that it is desirous that no securities for which such registration statement is filed should be legally sold until the necessary amendments shall have been made, may thereupon request the person referred to in the above rule to file an amendment prior to the effective date of the registration statement delaying the proposed date of the offering of the securities for which the registration statement is filed. Such amendment, which may under the above rule be filed by the person named in the above rule, if filed prior to the effective date of the registration statement, will under Section 8(a) of the Securities Act automatically delay the effective date of the registration statement for twenty days after the filing of such amendment, until and unless some further action is taken by the Commission. The other necessary amendments properly executed may thereafter be forthcoming. Upon their filing the Commission can consent to such filing, with due regard to the public interest and the protection of investors, thereby making such amendments part of the registration statement. Such a procedure does not necessitate delaying the original effective date of the registration statement, if the amendments are duly executed and filed prior to such date. At most, it necessitates a delay in the date of offering the security for one day, and even this

day may be eliminated by requesting the withdrawal of the amendment first filed. This procedure permits delaying the coming of an effective date when the registration statement unless amended is inaccurate or incomplete. At the same time it afford a registrant the opportunity to amend without having initiated against him proceedings looking forward to the issuance of an order under Section 8(b) or 8(d). Lack of cooperation on the part of a registrant by failing promptly to make the necessary amendment will require the Commission to initiate proceedings looking forward to the issuance of an order under Section 8(b) or 8(d).

A registrant may seek to avoid the making of such an amendment or the initiation of proceedings looking forward to the issuance of an order under Section 8(b) or 8(d) by requesting that his registration statement be withdrawn or by requesting that an order of the type specified in paragraph 1(c) of the rule above be entered.

INCORPORATION BY REFERENCE OF EXHIBITS FILED WITH PREVIOUS REGISTRATION STATEMENTS.

The issuer of a security for which a registration statement is in effect may, in filing a subsequent registration statement, incorporate by specific reference such exhibits or parts thereof, which may have been filed with any of its previous registration statements, as it may choose. If the inclusion of additional items would be necessary to make such a reference complete, the issuer will be deemed to have complied with the requirement if, along with the reference, it also files such additional items. If alterations have taken place in any document, a copy of which was filed as an exhibit with a previous registration statement, the copy so filed may be incorporated by reference, if the issuer files along with the reference a statement indicating all deletions, and containing the text of all substitutions and additions, and stating the date or dates on which such changes took effect. The Commission, however, may refuse to recognize any incorporation by reference in any case where

in the opinion of the Commission such incorporation by reference is unclear or confusing.

DISTRIBUTION UNDER SECTION 2 (11) DEFINED TO INCLUDE CERTAIN ACTIVITIES.

A person, the chief part of the business of which consists in the purchase of the securities of any one issuer, its subsidiary and/or affiliate and in the sale of its own securities to furnish the proceeds with which to acquire the securities of such issuer, subsidiary and/or affiliate, is to be regarded as engaged in the distribution of the securities of such issuer, subsidiary and/or affiliate within the meaning of Section 2 (11).